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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 119.

HE SUN MUTUAL INSURANCE COMPANY, APPELLANT,

vs.

THE OCEAN INSURANCE COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED OCTOBER 22, 1879.

X

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1 To the honorable Samuel Blatchford, judge of the district court of the United States for the southern district of New York.

The libel and complaint of The Ocean Insurance Company, against The Sun Mutual Insurance Company, in a cause of contract, civil and maritime, alleges as follows:

First. That the libellants are a marine insurance company, a body corporate, incorporated under the laws of the State of Maine and having its place of business in Portland, in said State, for the purpose and with the power to insure against losses by the perils of the seas.

Second. That the defendants are a marine insurance company, a body body corporate, incorporated under the laws of the State of New York, and having its place of business in New York, in said State, for the purpose and with the power to insure against losses by the perils of the seas.

Third. That before the 20th day of March, 1864, the said libellants and the said defendants entered into an agreement, that the said
2 defendants should on request reinsure the said libellants on risks taken by the said libellants on all such risks as the said defendants should, from time to time, approve and endorse on an open policy to be made by said defendants; and the said defendants made their open policy, No. 51564, whereby they undertook and agreed to insure, and did insure, the said libellants upon the risks hereinafter specified, which were approved by said defendants, and endorsed on said open policy.

Fourth. That the American ship, Charles S. Pennel, then being in the port of New York, and George M. Melcher being the owner of one-eighth of said vessel and master of said vessel, and said vessel having been chartered on the 30th day of January, 1864, to A. J. Schoen & Co., and J. D. Mutzenbecher & Sons, merchants and agents of Messrs. Henry Witt & Shutte, Lima, agents of the Supreme Government of Peru, and the consignees of guano in Germany, for a voyage on the high seas, from New York to San Francisco, thence to Callao and the Chincha Islands for a cargo of guano, and thence to Hamburg or Rotterdam with said cargo, as by the said charter will appear, the said charter-party being of the great value of $52,400, and the primage thereon being of the great value of $2,650, and said Geo. M. Melcher, being interested in said charter, and also in said primage, and being the owner of certain property on board said ship, the said libellants, by their policy No. 24580, made by them in consideration of $588.10 premium, and $1.20 for said policy, paid by said Melcher, did cause to be insured and did insure the said Geo. M. Melcher, on the high seas, at and from New York to San Francisco, $6,550 on charter, meaning the said charter, $2,650 on primage, meaning the said primage, and also $1,500 on property on board, meaning said property, against the perils of the
3 seas and other perils, enumerated in said policy of insurance at and from New York to San Francisco, on the high seas.

And thereupon the said libellants on the 23d day of March, 1864, being interested in said charter, and said primage, and said property on board, and in said insurance thereon for the reinsurance of the said libellants thereon, made an application to the defendants to enter upon said open policy No. 51564, $6,550 on charter, $2,650 on primage, and $1,500 on property on board said ship Charles S. Pennell, at and from New York to San Francisco aforesaid, including war risk, being the same risk insured by these libellants, and the said defendants on the receipt of said application approved the same, and endorsed the

same on said open policy, at a rate of premium of six per cent. for war and marine risk, which premium, amounting to $642, these libellants paid to said defendants for said reinsurance, which the said defendants thereupon made as aforesaid.

Fifth. That the said ship Charles S. Pennell, set sail from the port of New York, on or about the 1st day of April. 1864, on the voyage described in the said policy of said libellant, and said open policy of said defendants and thereafterwards, and on or about the 25th day of May, then next following, whilst proceeding on said voyage, and before reaching said port of San Francisco, by the perils of the seas, whilst off the coast of Brazil upon the high seas, was forced on a shoal and reef, and was there stranded and wrecked, and so damaged and injured by the perils insured against, that she could not proceed on said voyage, but from necessity immediately taken to the port of Rio Janeiro, and condemned, and from necessity sold, whereby the said Melcher wholly lost said charter and his interest therein, amounting to the sum of $6,550, and said primage amounting to $2,650, and his property on board said ship, of the value of $1,500, whereby these libellants as such insurers became and were liable to pay the said
4 several sums of $6,550, $2,650, and $1,500, amounting in all to the sum of $10,700 to the said George M. Melcher, and on notice of said loss to these libellants, these libellants gave notice to said defendants, The Sun Mutual Insurance Company, which said defendants then declared that payment of said loss should be refused and the same was accordingly refused, and an action was thereafter brought by said Melcher, in the supreme judicial court of the State of Maine against these libellants, to recover the same of these libellants, and such proceedings were thereupon had, that said Melcher, on the 7th day of December, 1872, recovered against these libellants on the said policy given by the said libellants the sum of $9,200, and interest from April 28th, 1865, as by the record of said judgment will appear.

Sixth. That by reason of the premises these libellants became and were liable to pay, and did pay to the said Melcher the said loss, and the said defendants became, and were liable, under and by virtue of said open policy, and said loss and payment, to pay the said loss to these libellants, which they have refused and still do refuse to pay, to the damage of these libellants, of sixteen thousand dollars and upwards.

Seventh. That all and singular the premises are true and within the admiralty and maritime jurisdiction of the United States.

Wherefore, the libellants pray that process in due form of law, according to the course of this honorable court, in causes of admiralty and maritime jurisdiction, may issue against the said defendants, The Sun Mutual Insurance Company, and that they may be required to answer all and singular the matters aforesaid, and that this hon-
5 orable court would be pleased to decree the payment of the amount due the libellants, as aforesaid, with interest and costs, and that the libellants may have such other and further relief, as in law and justice they are entitled to receive.

JAMES BALANCE, *Agt.*

Sworn to before me this 24'h day of September, 1873.

WM. D. JONES,
Notary Public for Kings County.

BENEDICT, TAFT & BENEDICT,
Proctors for Libellants.
E. C. BENEDICT, *Advocate.*

6 [SEAL.] The President of the United States to the marshal of the southern district of New York, greeting:

Whereas a libel has been filed in the district court of the United States of America for the southern district of New York, on the twenty-fourth day of September, in the year of our Lord one thousand eight hundred and seventy-three, by The Ocean Insurance Company, against The Sun Mutual Insurance Company, in a certain action, civil and maritime, for breach of contract therein alleged to be due and owing the said libellants, amounting to sixteen thousand dollars, and praying that a citation may issue against the said respondent, pursuant to the rules and practice of this court.

Now, therefore, we do hereby empower and strictly charge and command you, the said marshal, that you cite and admonish the said respondents, if they shall be found in your district, that they be and appear before the said district court on the thirtieth day of September, 1873, at the U. S. court room, 41 Chambers street, in the city of New York, then and there to answer the said libel and to make their allegations in that behalf; and have you then and there this writ, with your return thereon.

Witness the honorable Samuel Blatchford, judge of the said court, this twenty-fourth day of September, in the year of our Lord, one thousand eight hundred and seventy-three, and of our Independence the ninety-eighth.

GEO. T. BETTS, *Clerk.*

BENEDICT, TAFT & BENEDICT,
Libellants' Proctors.

7 I hereby certify that on the twenty-fifth day of September, 1873, at the city of New York, in my district, I personally served the within writ upon the within-named Sun Mutual Insurance Company, by exhibiting to Isaac H. Walke, its vice president, the within original with the seal of the court thereon, and at the same time leaving with him a copy thereof.

OLIVER FISKE,
U. S. Marshal, Southern Dist. of N. Y.

Dated New York, September 26th, 1873.

8 U. S. district court, southern district of New York.

THE OCEAN INSURANCE COMPANY
against
THE SUN MUTUAL INSURANCE COMPANY.

Amendments to libel.

First. Near the close of the fifth division of the libel, after the words "April 28th, 1865," insert the following, to wit, "of which said recovery said libellants paid before judgment was entered $4,234.29, and on June 28th, 1873, judgment was duly entered for the balance of said recovery, $9,473.71, debt or damage and costs of said suit taxed at $574.17."

Second. In the fourth line of the sixth division of the libel, after the

word "loss," insert "and costs so recovered as aforesaid," and in the sixth line of said sixth division, after the word "loss" insert "and said judgment," and in the seventh line of said sixth division, after the word "loss," insert "and costs," and after the word "libellants" in the same line insert "with interest, and also the further sum of $1,164.70
9 counsel fees, costs, and expenses of said suit paid by these libellants, other than the costs above mentioned, with interest thereon from the time of such payment, July 23d, 1873."

Third. At the close of the sixth article add the following words: "That due proof of loss, costs, expenses, and counsel fees, and of interest was furnished to said respondents more than thirty days before the commencement of this action, and payment was demanded of said respondents and refused."

To the honorable Samuel Blatchford, judge of the district court of the United States, for the southern district of New York:

The answer of The Sun Mutual Insurance Company, respondent, to the libel and complaint of The Ocean Insurance Company, in a cause of action, civil and maritime, alleges as follows:

First. That the matter set forth in the first article of the said libel and complaint are true as therein stated.

Second. That the matter set forth in the second article of the said libel and complaint are true as therein stated.

Third. That on or about the 16th January, 1864, the respondent issued to the libellant its open policy of insurance—being a reinsurance policy—bearing date on that day and numbered 51564, whereby on account of whom it might concern, loss payable to the libellant, the respondent did make insurance and cause the libellant to be insured at and from Cuba to Boston, or Portland, on property laden or to be laden on board of any vessel or vessels, with the understanding and agreement,
10 among others, expressed in writing in the said policy of insurance, that the respondent did not take any risk unless the libellant should take and have an amount on the same risk equal to one-half the amount covered by the respondent (meaning that the respondent should not be called upon to become reinsurers of the libellant under the said policy, and should not be liable as reinsurers of any risk under the same unless the libellants should have on the same risk, uncovered by reinsurance, an amount at least equal to one-half of the amount reinsured by the respondent), and that the said policy of insurance contained other provisions usual in policies of insurance, and among others the provision that if the assured should have made any other insurance upon the insured premises prior in date to the said policy, then the respondent should be answerable only for so much as the amount of such prior insurance might be deficient towards fully covering the said premises, as by the said policy of insurance in the possession of the libellant, and which the respondent prays may be produced by the libellant, and to which when produced the respondent prays leave to refer for the entire contents of the same, will, reference thereto being had, more fully and at large appear.

That subsequent to the making of the said policy of insurance the libellant applied to the respondent to have the same extended so that it might be made applicable to risks between other places than at and from Cuba, to Boston, or Portland, and that thereupon it was, by a written memorandum endorsed upon the said policy in reference to such limitation, agreed between the libellant and respondent that the said policy was to cover such other risks as the respondent might approve

and endorse thereon, but that such memorandum was not intended to, and did not alter the provisions hereinbefore referred to, excluding all liability of the respondent upon any risk unless the libellant should retain on the same risk, uncovered by reinsurance, an amount equal to one half of that covered by the respondent.

11 That except as herein stated, the respondent denies each and every allegation contained in the third article of the said libel and complaint.

Fourth. That on the 23d March, 1864, the ship Charles S. Pennell, was lying in the port of New York, and that George M. Melcher was then her master; but whether he was then the owner of one-eighth or any other share or portion of the said vessel, or whether the said vessel had at the time stated in the said libel and complaint, or at any other time, been chartered to the persons therein mentioned, or to any other person or persons for a voyage on the high seas, from New York to San Francisco, thence to Callao and the Chincha Islands for a cargo of guano, and thence to Hamburg or Rotterdam with the said cargo, or whether, if such vessel had been so chartered, such charter and the primage thereon were of the value of the sums in that behalf stated in the said libel and complaint, or of any other sums whatever, or whether the said George M. Melcher was interested in such alleged charter or in such alleged primage, or whether he was the owner of any property on board of said ship, the respondent says that it has not nor has any of its officers any knowledge nor sufficient information to enable them to form a belief, and it therefore leaves the libellant to make such proof of the allegations in those respects contained in the said libel and complaint as the libellant shall be advised or as this court shall direct. That at the time of the application by the libellant to the respondent for the reinsurance hereinafter mentioned, the latter had not, nor had any of its officers or agents heard of any such charter, nor did either of them ever have any intimation of any such charter until after the loss of the said Charles S. Pennell, as hereinafter mentioned. But the respondent says that at the time of such application for rein-

12 surance the said ship Charles S. Pennell was lying in the port of New York, bound on a voyage to San Francisco, and under a charter to carry a cargo of coal and other merchandise from said New York to said San Francisco, and that she was then nearly or entirely loaded and ready to sail upon that voyage and upon no other, as was well known to the respondent and to other persons having dealings with the said ship.

That the respondent believes it to be true, and therefore admits that the libellant did at the time in that behalf stated in the said libel and complaint issue its policy of insurance to the said George M. Melcher, whereby it undertook to insure him against the perils of the seas, as expressed in such policy as follows:

Sixty-five hundred and fifty dollars on charter, twenty-six hundred and fifty dollars on primage, and also fifteen hundred dollars on property on board the ship Charles S. Pennell, at and from New York to San Francisco, including war risk; but for the exact contents of such policy of insurance and the precise nature of the undertaking entered into thereby by the libellant, the respondent prays leave to refer to the said policy itself, which the respondent is informed and believes is now in the possession of the libellant. But the respondent denies that in issuing such policy of insurance the libellant, by the expression therein contained of "sixty-five hundred fifty dollars on charter" meant the alleged guano charter referred to in the said libel and complaint, or by

the expression "twenty-six hundred fifty dollars on primage" meant the primage on the charter money under such alleged charter. On the contrary, the respondent says that both of such expressions referred and were intended by the libellant to refer to the charter of the said ship Charles S. Pennell, hereinbefore mentioned, under which she was
to carry coal and other merchandise from the port of New York
13 to the port of San Francisco, and was never pretended by the libellant to refer to any other than the said last mentioned charter until after a recovery had been had against the libellant upon said policy as hereinafter set forth, when it shifted its ground and claimed that said expressions referred to the said alleged guano charter.

That the respondent has no knowledge or information whether, by the means stated in the said libel and complaint or otherwise, the libellant became interested in the charter, primage, and property referred to in the fourth article of the said libel and complaint, or in any or either of them or any part thereof, and the respondent leaves the libellant to make such proof of the allegations in that behalf contained in the said libel and complaint as the said libellant shall be advised, or as this court shall direct. But the respondent says that on the 23d March, 1864, the libellant sent to the respondent an application in the following words, that is to say:

"To The Sun Mutual Insurance Company: Enter on open policy of this company No. 51564, $6,550 on charter, $2,650 on primage, $1,500 on property on board ship Charles S. Pennell, at and from New York to San Francisco, including war risk. Rate six per cent. on board. New York, March 23, 1864."

And that the respondent, understanding such application to refer to the charter of the said ship on her said voyage from New York to San Francisco, on which she was then bound, and under which charter she had been then nearly or completely loaded with merchandise to be carried to said San Francisco, and not being aware or having heard of any other charter of the said vessel, thereupon endorsed the same upon the said open policy, issued as aforesaid by the respondent to the libellant, at the rate of premium specified in the said libel and complaint, which
amounted to the sum therein mentioned, and which the libellant
14 paid to the respondent. But the respondent denies that thereby or otherwise the respondent became the reinsurer of the libellant for any interest in the said alleged guano charter referred to in the libel and complaint, or in any primage thereon, or that the respondent became the reinsurer of the libellant upon any matter of insurance whatsoever, except subject to the conditions and stipulations of the said reinsurance policy hereinbefore set forth, and the other conditions and stipulations therein contained.

Fifth. That said ship Charles S. Pennell set sail from the port of New York on or about the day in that behalf stated in the said libel and complaint on her said voyage to San Francisco, to which she was bound under her said charter, to take a cargo of coal and other merchandise, to the last mentioned port; and if the libellant means to allege by his reference in the said libel and complaint to the description in the original and reinsurance policies of the voyage of the said vessel, that she sailed from the port of New York upon any other voyage than that to the port of San Francisco, for the purpose of fulfilling the said charter, under which she was employed to carry said coal and merchandise to the last mentioned port, the respondent denies such allegation, and says that if, by any means of interpretation apart from extrinsic circumstances, the voyage described in the said policies could be con-

strued as referring to that which involved the fulfillment of the said alleged guano charter (which the respondent denies), the said ship never broke ground upon that voyage, and could not break ground upon the same until her arrival at San Francisco.

Thus, the respondent is informed, that some disaster happened to the said ship Charles S. Pennell after she left the port of New York upon the said voyage, and before her arrival at the port of San Francisco; but what the nature of such disaster was, or what it resulted in,
15 the respondent does not know, and has not, nor has any of its officers, sufficient information to enable it or them to form a belief, and the respondent cannot state therefore whether the allegations of the said libel and complaint in regard to the stranding and wrecking of the said vessel, and the damage and injury to her, and her subsequent condemnation and sale at Rio de Janeiro are true or otherwise, and the respondent therefore leaves the libellant to make such proof of said allegations as he shall be advised, or as this court shall direct. But the respondent denies that thereby or otherwise the said Melcher lost any of his property on board of said ship; on the contrary, the respondent says that all of said property was saved, and that no claim therefor was ever made by him against the libellant under the said policy of insurance, issued to him by the libellant or otherwise.

That after the happening of the said disaster to the said ship it transpired and became known to the libellant and respondent that the said Melcher's interest in the said charter, under which the said ship was employed to carry a cargo of coal and other merchandise from New York to San Francisco, and the primage upon the charter money mentioned therein, were fully covered by insurances prior to those made as aforesaid by the libellant and respondent, by and under the said original and reinsurance policies, issued by them respectively, and that therefore, according to the terms of the said policies, no liability attached to either the libellant or respondent for or in respect of that charter or of the primage upon the money therein mentioned, and that thereupon the said Melcher claimed that the said policy of insurance issued to him by the libellant related to the said alleged guano charter and the primage upon the charter money mentioned therein, and that he was entitled to recover the said sums of $6,550 and $2,650 from the libellant for the loss of his interest in said last mentioned charter and primage. That such claim was disputed and
16 refused by the libellant upon the express ground that the said policy issued by the libellant had no application to the said alleged guano charter, but referred and was intended to apply only to the said charter under which the said vessel was employed to carry the said cargo of coal and other merchandise from New York to San Francisco; and that the libellant having in or about the month of April, 1865, given to the respondent notice of the making of such claim, the respondent acquiesced in such dispute and refusal by the libellant of the same, and did, so far as the respondent was concerned, refuse to recognize said claim as falling within the terms of said reinsurance policy.

That thereupon, as far as the respondent is informed and believes, an action was instituted by the said Melcher against the libellant, in the supreme judicial court of the State of Maine, to recover from the libellants the said sums of $6,550 and $2,650, as for the said Melcher's interest in the said alleged guano charter and the primage under the same, and that such action resulted in a judgment against the libellant for the said two sums, amounting to $9,200, with interest from April

28th, 1865; and the respondent prays leave to refer to the said judgment and the proceedings in the said action for the grounds upon which the said judgment was given. and they say that such judgment was given against the libellant mainly upon the ground that one Andrew S. Sawyer, who was the said Melcher's agent for effecting said insurance and other insurances upon his interest in the said ship, applied to the libellant for such insurance of $6,550 and $2,650, and at the time of such application produced and exhibited to the president of the libellant to whom personally such application was made, a letter from said Melcher to said Sawyer, requesting the latter to procure insurances of said sums of $6,550 and $2,650 upon said alleged guano charter, and the primage of the same; and that upon the strength of evidence of those facts, and of such evidence alone
17 the said insurance made by the libellant was held to be applicable, to the said alleged guano charter. But the respondent says that said letter was never exhibited or communicated to it, or to any of its officers or agents by the libellant, nor did the respondent ever know or hear of its existence, or of any purpose or intention on the part of the said Melcher, or his agent, or on the part of the libellant to make the said policy, issued by the libellant, applicable to the said alleged guano charter until several years after the making of the said reissuance by the respondent; that is to say, about the month of January, 1872, when it was brought to the respondent's attention by its counsel, after an examination by him of the proceedings on the trial of the said Melcher's action against the libellant, and when the respondent immediately notified the libellant, through its counsel, of the refusal of the respondent to be bound by any judgment rendered in the said action, which should be based upon the fact of the exhibition of said letter, by said Sawyer, to the president of the libellants, or upon anything which took place between the president and said Sawyer when the original insurance was applied for by the latter, inasmuch as none of said matters were communicated to the respondent at the time of the application for said reinsurance. And the respondent says that at the time it made such reinsurance it had not, nor had any of its officers any knowledge or information of any matter or thing whatsoever, in regard to the said original insurance, or of its application to any particular subject matter than the notice from the libellant to the respondent hereinbefore set forth, requesting the latter to enter the said sums of $6,550, $2,650, and $1,500 upon the said reinsurance policy, and that they had no knowledge or information of any fact, matter, or thing which could operate to make the said insurance, so far as concerned the said $6,550 and $2,650, applicable to any
18 other subject matter than the said charter under which the said ship was employed to carry a cargo of coal and other merchandise, from New York to San Francisco, and that had the respondent had knowledge of any such fact, matter, or thing, and especially if it had been aware of any purpose to make the said insurances applicable to the said alleged guano charter, the respondent would have declined to become the libellant's reinsurer therefor, for the reasons, among others, that it would have involved a large over-insurance upon or in respect of the said Melcher's interest in the said ship, that the accumulation of so large an amount of insurance thereon (making nearly three times its value) would have been contrary to the rules and principles which govern prudent underwriters in making insurances, and would have offered strong inducements to the said Melcher (supposing him to be subject to pecuniary temptation) to cast the said ship away.

That the respondent denies everything alleged in the fifth article of the said libel and complaint not hereinbefore specifically answered and except as herein stated.

Sixth. That by reason of the matters in this answer stated and not otherwise, the libellant became liable to pay to the said Melcher the amount of the said judgment recovered against it, but whether it has paid the same the respondent does not know, is not informed, and cannot answer. That the respondent denies that the respondent became or was or is liable under or by virtue of the said open policy of insurance or otherwise to repay the amount of the said judgment or any part thereof to the libellant, or that the respondent is indebted to the libellant in any sum whatever by reason of such reinsurance of the said sum of $6,550 and $2,650 upon the charter of the said ship and the primage thereon as described in the application by the libellant for such reinsurance and on the endorsement thereof upon the
19 said reinsurance policy. The respondent admits that it has refused and still refuses to pay to the libellant the amount which the latter claims to be due to it under said reinsurance, but the respondent denies that the libellant has thereby or otherwise sustained damage to the amount stated in the libel and complaint or in any other sum.

Seventh. That besides the said insurance made by the libellant under the policy issued to the said Melcher as aforesaid, and the prior insurance upon his interest in the said charter under which the said ship was employed to take a cargo of coal from New York to San Francisco, and in the primage under that charter, his interest in the said ship was also insured to its full value, and that considering the insurance made by the libellant applicable to the said alleged guano charter, the amount of insurance upon or in respect of the said Melcher's interest in the said ship, which rested upon the same when the said ship sailed upon her said voyage to San Francisco, was, as the respondent is informed and believes, twenty-two thousand dollars, which was about thrice the value of the said ship, and more than any prudent underwriter would knowingly venture upon the same.

Eighth. That as an additional defense to the cause of action set forth in the said libel and complaint, the respondent says that if so much of the insurance of $6,550, $2,650, and $1,500 as was applicable to charter money and primage, was regarded by the libellant as relating to the said alleged guano charter and the primage thereon, then the respondent says that the libellant violated the terms of the said policy of reinsurance in seeking to obtain indemnity for the whole of those amounts from the respondent, the libellant itself not having retained an amount equal to one-half of the risk which it attempted to cast upon the respondent in respect thereof, as by the said reinsurance policy the libel-
20 lant was bound to do as a condition to imposing any risk whatever as a reinsurer upon the respondent under that policy. Wherefore the respondent claims and insists that even if the said insurances made by the libellant should as between the libellant and respondent be considered as relating to the said alleged guano charter, the libellant cannot, by reason of its breach of said condition, claim any indemnity under such reinsurance policy from the respondent, and has no right, therefore, to maintain the present action against the latter.

Ninth. That as an additional defense to the cause of action set forth in the said libel and complaint, the respondent says that such cause of action accrued, if at all, more than six years before the commencement of this action, and that it is therefore barred by the statute of the State

of New York (in which State such reinsurance policy was made) in such case made and provided.

Tenth. That all and singular the matters herein contained are true, in verification whereof, if denied, the respondent prays leave to refer to the deposition and proofs to be taken and exhibited herein.

Wherefore the respondent prays that the said libel and complaint may be dismissed, and that the costs and expenses of the respondent may be decreed to it.

THE SUN MUTUAL INSURANCE COMPANY,
By JOHN P. PAULISON, *President.*

EVARTS, SOUTHMAYD & CHOATE,
Proctors for Respondent.
CHARLES E. BUTLER, *Advocate.*

Subscribed and sworn to before me, by the said John P. Paulison, on the 13th day of November, 1873.

[SEAL.] PRESCOTT HALL BUTLER,
Notary Public, N. Y. County.

21 For the libellants, appear, E. C. Benedict, esq., E. N. Taft, esq., and R. D. Benedict, esq.; for the respondents, appear Joseph H. Choate, esq., and C. H. Tweed, esq.

GEORGE A. WRIGHT, a witness called on behalf of libellants, being duly sworn, testified:

Direct examination by Mr. TAFT:

Q. Where do you reside?

A. I reside in Portland, State of Maine.

Q. Are you the secretary of the libellants here, The Ocean Insurance Company?

A. Yes, sir.

Q. How long have you been secretary of that company?

A. Twenty-one years.

Q. What is the place of business of the company?

A. At Portland, State of Maine.

Q. I show you now the policy of The Sun Mutual Insurance Company to The Ocean Insurance Company, No. 51564, and ask you if you recognize that policy?

A. Yes, sir.

Q. Your company received that from The Sun Mutual?

A. They did.

Q. The Sun Mutual Insurance Company was a company here in New York City, was it not?

A. Yes, sir.

Q. I suppose you received that policy at the date of it?

22 A. About the date of it.

Q. State the date of it.

A. It is dated the 16th day of January, 1864.

Q. Do you remember whether you received it by mail?

A. No, sir; I do not remember.

Q. I call your attention to an endorsement on that policy on the side: "4th Feb., 1864. It is also agreed to cover such other risks as this company may approve and endorse hereon; J. W., V. P." What does that signify?

A. It means, J. Whitehead, vice-president.

Q. Were you present when that endorsement was made?
A. I could not say that I was.
Q. Do you remember whether it was done by correspondence?
A. My impression is that it was.

By the COURT:

Q. Have you any recollection about it?
A. No, sir; no distinct recollection; I have an impression, but what it arises from I am unable to say.
(Counsel for libellants offers in evidence the policy with endorsements thereon. Received and marked Exhibit No. 1.)

By Mr. TAFT:

Q. Here is a letter of January 29th, 1864, from William W. Woodbury, president; he was president of The Ocean Company, was he not?
A. Yes, sir.
Q. "To J. Whitehead, esq., vice-president, New York;" he was vice-president of The Sun Mutual Insurance Company?
A. Yes, sir.
(Libellants' counsel offers the letter in evidence. Received and marked Exhibit 2.)

23 Q. And here is the answer from The Sun Company, dated January 30th, 1864, to the president of The Ocean Company—from Mr. Whitehead to Mr. Woodbury?
A. Yes, sir.
(Libellants' counsel offers the letter in evidence. Received and marked Exhibit 3.)
Q. After these letters passed, was this policy sent forward to New York?
A. Yes, sir.
Q. And was this endorsement of February 4th made in pursuance of that correspondence?
A. I did not see it made.
Q. Well, was it made and returned to you?
A. Yes, sir; it was returned to us with the endorsement on it.

By the COURT:

Q. Look at the face of that policy. Now, when you sent that policy to New York in pursuance of this letter of the 30th January, what is there now on it that was not on it then?
A. The figure "4th," "Feb. 1864," in figures: "It is also agreed to cover such other risks as this company may approve and endorse hereon, J. W., V. P." or "V. Pt."
Q. Now, what else?
A. Then the figures "1864, Feb. 2," previous to the printed dollar mark; "100,000," in figures, and then also in words: "subject to the same conditions as before. E. R. Anthony," preceding the word "Secretary" printed; "J. Whitehead, vice" preceding the printed "president."
Q. And one of those stamps, I suppose?
A. I cannot remember about that.
Q. Anything else on the face?
A. I did not see anything further.
Q. All the rest was there before?
24 A. I think so.

By Mr. TAFT:

Q. In the course of business, where was this policy kept?

A. It was kept at our office—at the office of The Ocean Insurance Company.

Q. In Portland?

A. Yes, sir.

Q. And the endorsements of insurance that appear in this policy where made by whom?

A. Made by myself.

Q. They are all in your handwriting, are they not?

A. All but two, I think; I think I examined them, and I think all but two risks were in my handwriting; those two. (Pointing them out on the policy.)

Q. What are the dates of those?

A. Under May 3d, 1864, are in the hand of William W. Woodbury, who was then president of the company.

By the COURT:

Q. All that relate to C. S. Pennell are in your handwriting?

A. Yes, sir.

By Mr. TAFT:

Q. Coming to those endorsements, I now show them to you; they are in your handwriting, all relating to that ship.

A. Yes, sir.

(Libellants' counsel offers in evidence letter from Mr. Woodbury, president of The Ocean Company, to Mr. Whitehead, vice-president of the Sun Company, dated March 23d, 1864, with three enclosures. Received in evidence. Letter marked Exhibit 4, and enclosures 4 A, 4 B, and 4 C.

Also, letter from Mr. Whitehead, of The Sun Company, to Mr.
25 Woodbury, of The Ocean Company, dated March 24th, 1864. Received and marked Exhibit 5.

Also letter from Mr. Woodbury to Mr. Whitehead, of March 26th, 1864. Received and marked Exhibit 6.

Also letter from Mr. Woodbury to Mr. Whitehead, of March 28th, 1864. Received and marked Exhibit 7.

Also policy of The Ocean Insurance Company to George M. Melcher, $6,550 on charter, $2,650 on primage, and $1,500 on property—voyage from New York to San Francisco. Received and marked Exhibit 8.)

Q. Do you remember receiving any notice of the loss of this property, here insured by you in your policy, which has been put in evidence?

A. Yes, sir; I remember.

Q. What was about the date of that, as near as you can give it?

A. I could not say the exact date.

Q. No, but the time of the year or something near it.

A. Well, I should say *in* was somewhere in July; July or August, 1864; somewhere along there; I probably have it minuted on the copy of the policy at the office—the precise date.

Q. Were any proofs of loss furnished to your company?

A. Yes, sir; the usual proofs.

Q. What did you do with them?

A. We examined them.

Q. Did you turn them over to The Sun Company?

A. Yes, sir.

By the COURT:

Q. You mean you sent the originals to The Sun Company?

A. Yes, sir.

26 By Mr. TAFT:

Q. About what time did you receive the proofs of loss?

A. My impression is the time we got them was in July or August, 1864.

By the COURT:

Q. You think you received the proofs in July or August, 1864?

A. Yes, sir.

By Mr. TAFT:

Q. How soon after that was it you turned them over to The Sun Company?

A. Oh, a very short time.

Q. Did you go to New York at all in regard to that subject to see the officers of The Sun Company?

A. Yes, sir; among other things.

Q. You had interviews with them?

A. Yes, sir; and brought those papers to them.

Q. And delivered them over to them?

A. Yes, sir.

By the COURT:

Q. You brought them personally, these proofs of loss?

A. Yes, sir; I think so.

Q. Whom did you give them to?

A. That I do not remember, sir.

By Mr. TAFT:

Q. Was it to one of the officers?

A. Yes, sir; Mr. Anthony, I think, was secretary at that time, and Mr. Whitehead was vice-president; I think it was Mr. Anthony who looked them over particularly; Mr. Anthony and I did all the business relating to the policies; Mr. Whitehead did not have much to say or do with them.

By the COURT:

Q. You remember looking over these proofs of loss with Mr. Anthony at The Sun office?

27 A. Yes, sir.

By Mr. BENEDICT:

Q. Mr. Anthony was the active man?

A. He was the secretary.

By Mr. TAFT:

Q. You say Mr. Anthony was at that time secretary of the company?

A. Yes, sir.

Q. Go on and state what occurred between you and The Sun Company.

A. That would be impossible, sir; I could not do it.

By Mr. BENEDICT:

Q. Did you see anybody besides Mr. Anthony?

A. The usual officers of the company were there.

By Mr. TAFT:

Q. Will you state about the time of that interview?

A. I say my impression is, it was in July or August.

Q. Did you ever have more than one interview with any of the officers of the company in relation to this matter?

A. I do not remember of any other personal interview.

Q. You were here at the office of the company, subsequent to that interview, at different times?

A. Oh, yes, sir, many times; I could not tell how many.

By Mr. BENEDICT:

Q. Were there frequent personal interviews between the officers after your coming here to see them?

A. Yes, sir.

By Mr. TAFT:

Q. In any of those subsequent interviews was this subject spoken of at all?

A. That I could not remember distinctly; I do not remember the particular instances.

28 Q. The time you looked over these proofs of loss were any objections made to the proofs of loss?

A. Not to the proofs, no, sir; not as to the proofs; when I say that, I mean as to the forms.

Q. The proofs of loss—the sufficiency of them?

A. Yes, sir.

By the COURT:

Q. The question is, at the time you looked them over with Mr. Anthony he made no objection to the form of the proofs of loss?

A. No, sir.

By Mr. TAFT:

Q. Neither as to the proofs of loss nor the proof of interest—no objections were made?

A. I do not remember that he did.

Q. Had there ever been any objections made on the subject of the proof of loss or interest down to the time this suit was brought?

A. Never, to my knowledge.

(Libellants' counsel offers in evidence a letter of June 16th, 1865, from Mr. Woodbury, president of The Ocean Insurance Company, to E. R. Anthony—"given here as vice-president of the The Sun Mutual.")

The WITNESS. Yes, I think Mr. Whitehead died about September.

Q. And then Mr. Anthony was elected vice-president?

A. Yes, sir.

(Letter received and marked Exhibit 9.

Libellants' counsel also offers in evidence letter from Mr. Anthony to Mr. Woodbury, dated June 17th, 1865, and acknowledging the receipt of that of June 16th, 1865, just put in evidence. Received and marked Exhibit 10.)

29 Q. Suit was begun against The Ocean Insurance Company by Melcher on this policy which has been read in evidence, Exhibit No. 8?

A. Yes, sir.

By the COURT:

Q. A suit on that policy by itself?

A. Yes, sir.

Q. A separate suit?

A. Yes, sir.

Q. Involving nothing else?

A. No, sir.

(Libellants' counsel offers in evidence certified copy of record in the

suit just referred to—supreme court, State of Maine, county of Cumberland; George M. Melcher vs. Ocean Insurance Company. Respondents' counsel objects to receiving this as proof of the loss. Received subject to objection and marked Exhibit 11.)

By Mr. TAFT:

Q. In regard to payments—I want to ask you about those. You have a memorandum, have you not, of your payments and computation of interest? Please give those so they can be taken down.

A. On July 19th, 1873, I paid for The Ocean Insurance Company $4,234.29; that was amount of a trustee process that was instituted against us.

By the COURT:

Q. To whom did you pay it?

A. We paid it on an execution, Melcher, trustee; we paid it to the sheriff.

By Mr. TAFT:

Q. That was to satisfy a trustee process?

A. Yes, sir; that was to satisfy a trustee process of somebody against Melcher, and we were trustees.

30 By the COURT:

Q. Is this what you paid: "Trustee action in No. 101, Benjamin N. Melcher vs. George M. Melcher and The Ocean Insurance Company, trustees," and you paid, as this states here, $4,234.29?

A. Yes, sir; that is the amount I paid.

By Mr. BENEDICT:

Q. That was on account of this loss?

A. Yes, sir.

By the COURT:

Q. On an execution in the trustee judgment mentioned in the record No. 101?

A. Yes, sir.

Q. What else did you pay?

A. On July 21st, 1873, I paid—The Ocean Insurance Company paid—$10,086.55.

Q. You must separate that.

A. No, sir; that is the amount I paid.

Q. Yes, but you must separate it; you paid what was left of this judgment to somebody; you did not pay it all to the same people?

A. This $10,086.55 was the amount of the judgment for the interest and costs, I take it.

By Mr. TAFT:

Q. Did you include the costs in that?

A. I presume so.

Q. You paid the judgment that was finally entered and costs, $574.17?

A. Yes, sir; July 19th I paid the first amount.

By the COURT:

Q. Twenty-four days after the judgment you paid this amount?

A. $38.67 was the interest on it for twenty-six days.

Q. You understand that $10,086.55 was the amount of the
31 judgment entered June 28th, 1873, for $9,473.71, the debt of damage, and $574.17 costs, with interest to the day you paid it?

A. Yes, sir.
Q. That you understand to have made up the $10,086.55?
A. Yes, sir.
Q. Now, what else did you pay?
A. On July 23d, 1873, we paid J. & E. M. Rand their bill for costs and services.
Q. They were your lawyers?
A. Yes, sir.
Q. Counsel for The Ocean Insurance Company?
A. Yes, sir.
Q. Their bill for counsel fees, services, and expenses in defending this suit?
A. Yes, sir; for services, expenses, etc.

By Mr. TAFT:

Q. I will hand you Rand's bill (handing witness a paper). That is the bill you paid?
A. Yes, sir; that is the bill we paid; we paid them $1,164.70.
(Libellants' counsel offers in evidence the bill just shown witness. Received and marked Exhibit 12.
Also letter from George A. Wright, the witness, secretary of the Ocean Insurance Company, to The Sun Mutual Insurance Company, dated August 6th, 1873. Received and marked Exhibit 13.
Also letter of August 9th, 1873, from Mr. Paulison, president of The Sun Insurance Company, to Mr. Wright, secretary of The Ocean Insurance Company. Received and marked Exhibit 14.)

Cross-examination by Mr. CHOATE:

Q. Who were the executive officers of The Ocean Insurance Company at the time these risks were taken?
32 A. William W. Woodbury was president and I was secretary.
Q. Mr. Woodbury is dead?
A. Yes, sir.
Q. Did he die before the case in Maine was tried or afterwards?
A. He died before it was decided; he died in July, 1869.
Q. Was he living at the time of the trial of that case?
A. No, sir; I think not; no, sir.
Q. Who, on the part of that company, acted in taking the risk?
A. Mr. Woodbury.
Q. And he alone?
A. And he alone.
Q. You had nothing to do with it?
A. No more than to make the entry; I make the entry; that is all.
Q. Who acted on the part of Captain Melcher?
A. Mr. Sawyer made the application, I think.
Q. What was his first name and what was his business?
A. Andrew S. Sawyer, I think; I won't be positive about that; at all events, Sawyer; he is a farmer who raises vegetables for the market; he has a farm near the city and raises early vegetables.
Q. He acted as agent for Captain Melcher?
A. Yes, sir; he is a brother-in-law, I think, of Captain Melcher?
Q. Were you present at the interviews which took place between Mr. Sawyer and Mr. Woodbury which resulted in the making of the insurance?
A. I was in the office at the time that Mr. Sawyer was there and had the conversation with Mr. Woodbury.

Q. Did you hear it?

33 A. No, sir; the president's desk is some distance away from mine; oh, not far.

Q. Do you know what papers were presented to Mr. Woodbury by Mr. Sawyer?

A. No, sir, I do not.

Q. Do you know of a paper being presented?

A. I do not.

Q. Or exhibited?

A. I do not.

Q. Have you not in your possession a letter, or has your company, written by Captain Melcher to Mr. Sawyer from New York, dated March 20th, 1864?

(Counsel for libellants objects to the question as immaterial. Taken subject to objection. Libellants' counsel excepts.)

Q. Have you got that letter?

A. I have not, sir.

Q. Have you had it?

A. No, sir.

Q. Don't you know of its having been in the possession of your company?

A. I do not.

Q. Were you present at the trial of the case in Maine?

A. I was not.

Q. At no part of it?

A. At no part of it.

Q. Do you remember delivering the policy of The Ocean Company to Mr. Sawyer?

A. I do not remember it, but I have no doubt that I did.

Q. Do you remember a conversation which then took place between you and Mr. Sawyer?

A. I do not remember the conversation now, sir.

Q. Well, let me remind you. Do you remember his coming in

34 and asking for the policies and, on examining this policy of your company, which has been put in evidence here, his saying to you, "You have left out the word 'guano'?"

A. No, sir.

Q. Repeating the word 6,550, do you remember his saying to you, opening the policy and reading, "6,550 on charter"—"you have left out the word guano." Do you remember his saying that?

A. No, sir.

Q. Do you remember saying to Mr. Sawyer in reply that did not make any difference; the insurance you effected with Foy was freight; this is charter?

A. I do not remember it, sir.

Q. You say you did not attend the trial of the case in Maine?

A. I did not.

Q. Were you not called as witness?

A. No, sir.

Q. Who on the part of The Ocean Insurance Company directed the taking of that defence?

A. You mean the counsel?

Q. No; who on the part of your company?

A. The president of the company.

Q. Mr. Woodbury or his successor?

A. Mr. Woodbury originally——
Q. I mean at the trial.
A. Oh, the counsel.
Q. It was all left to them?
A. Yes, sir, I think so; I do not know whether Captain Davis was up there or not; I am not sure.
Q. Do you remember whether any denial was made on the part of the company, or whether any evidence was put in on the part of the company?
A. I do not know a particle about the evidence; I do not know anything about the case itself, or the management of it, or anything of that kind.
35 Q. Can you state on what ground the company defended the action?
A. I cannot tell anything about that, sir; I don't know anything about that.
Q. Where is Mr. Sawyer now? Is he living?
A. He is in Cape Elizabeth; I presume he is in Cape Elizabeth; he is living, so far as I know.
Q. Where is that?
A. Adjoining Portland; just a bridge separates them.

By Mr. BENEDICT:

Q. That is his residence?
A. Yes, sir.
Q. You do not know whether he is actually there himself?
A. No, sir.
Q. You do not know where he is?
A. No, sir.

By the COURT:

Q. You have not heard of his death?
A. No, sir.

By Mr. CHOATE:

Q. Captain Melcher—do you know where he is?
A. No, sir.
Q. Do you know where he resides?
A. My impression is in Brunswick.
Q. In Maine?
A. Yes, sir.
Q. Do you know of its ever being communicated by The Ocean Company to The Sun Company that before taking the risk The Ocean Company had had exhibited to them by Mr. Sawyer a letter from Captain Melcher, dated New York, March 20th, 1864, to Andrew Sawyer, which was used in evidence on the Portland trial?
(Libellants' counsel objects, that the witness has said he was not at the trial.)
36 Q. Do you know of any such communication ever having been made by The Ocean Company to The Sun Company?
A. No, sir.

JOHN RAND, a witness called on behalf of libellants, being duly sworn, testifies:

Direct examination by Mr. BENEDICT:

Q. You are a counsellor at law in the State of Maine?
A. Yes, sir.

Q. Were you counsel for The Ocean Insurance Company in the suit of Melcher against The Ocean Insurance Company?

A. I was.

Q. Look at that bill and say if that is your bill for services.

A. Yes, sir.

Q. Those services were rendered and you considered them reasonable charges?

A. They are not unreasonably high.

Q. Well, is that for the services in that suit—are these charges for the services in that suit?

A. Yes, sir; it is limited to the Melcher case.

Q. Is there a credit on there?

A. There is a credit under date of November 2d, 1869.

Q. What is that credit?

A. Credit by cash, Sun Mutual Insurance Company, $100.

Q. Will you explain to the court what that means?

A. It means that The Sun Mutual Insurance Company here, in their office in Wall street in this city, paid me $100 for fees when defending the Melcher case.

Q. For a fee towards defending that case?

A. Yes, sir.

Q. In the courts of Maine?

37 A. Yes, sir.

Q. Had you any interview with the president about the case at that time?

A. Yes, sir.

By the COURT:

Q. Was that the date that he paid it?

A. November 2d, 1869; yes, sir.

By Mr. BENEDICT:

Q. When was the suit commenced?

A. I see by my printed report of the case that the writ was dated September 6th, 1866, and of course it was entered at the October term of the supreme court, Cumberland County.

Q. That is your county?

A. Yes, sir; Portland is in Cumberland County; I can state, if you wish, the progress that the case had then made, and how I happened to be here, if you wish.

Q. Yes; I was going to ask that question.

A. There were two of these suits commenced by George M. Melcher, against The Ocean Company; they were both entered at the October term, 1866; they were continued from term to term, without any special action in court till the October term, 1867; nothing of any particular importance was done at that term, and it stood along until the October term, 1869, at which time the counsel for plaintiff began to be a little pressing, and I arranged with him that the case should, if possible, be tried at the January term, 1870; Mr. A. W. Whipple, representing himself as acting for the companies in New York who were interested in this risk, had been to Portland and had conferred with me in reference to the matter; I had had much correspondence with him on the subject, and finally I suggested to him in a letter, that it might be desirable that I should have a conference with The Sun Mutual in New York, and he requested me to come to New York; I did so——

38 Q. For that purpose?

A. For that purpose, and that only.

Q. Who was Mr. Whipple, and what had he to do with it?

Q. If I recollect aright the Washington Company had some risks on this property, and he had been an officer of that company—so represented himself. I called upon Mr. Whipple the next morning after my arrival, and he went with me to the office of The Sun Mutual, which I think was then at 54 Wall street; somewhere along there; he there introduced me to a person that he called Mr. Paulison, president of The Sun Mutual; I went into the matter very fully with Mr. Paulison.

By Mr. CHOATE:

Q. Please state exactly what was said.

A. Oh, that is impossible.

Q. Well, as near as you can; not give your conclusions.

A. I shan't give you any conclusions at any rate.

By the COURT:

Q. If you can, give the conversation—the words that were used. If not, give the substance of it.

A. It is impossible for me to give the conversation, or even the substance of it; I can only say that we went over the whole matter; I can state the grounds upon which Mr. Paulison placed the case or the defence of it.

By Mr. BENEDICT:

Q. State what he said as near as you can.

A. He stated that Melcher was grossly over insured; that was one of his grounds of defence, but the main ground of defence was that the vessel had been fraudulently cast away by Melcher.

By the COURT:

Q. Did he say this, or that he understood so?

39 A. Yes, sir.

Q. Did he say that the vessel had been fraudulently cast away by Melcher?

A. Yes, sir; he said that they were not satisfied that it was an honest loss.

By Mr. BENEDICT:

Q. Was Mr. Whipple present at this time?

A. Yes, sir; I think he was present during the whole of the first interview that I had with Mr. Paulison; I think he was.

Q. Now, go on with what Mr. Paulison said.

A. I had all the papers with me that had been placed in my hands in reference to the defence of the suit; the insurance companies in New York—I do not know that I can positively say the insurance companies; I so inferred from what Mr. Paulison said—but at any rate the Washington company had sent a man out to Rio, a Mr. Mayo, to investigate the circumstances attending the injury and consequent condemnation of this vessel and her sale; the vessel was taken into Rio and there condemned; Mr. Whipple had brought to me at Portland the reports which this man made up after his return from Rio, and I brought those papers with me to New York; after turning them over with Mr. Paulison and Mr. Whipple I told him they were of no consequence and no value, that they did not contain a single fact, nothing but rumors and conjectures and speculations, and that they were of no consequence; Mr. Paulison and myself discussed the points in the case; among other things we discussed the phraseology of the policy given by the Ocean Company to Mr. Melcher, containing the words,

"At and from New York to San Francisco;" I informed Mr. Paulison at that time that I intended to take the point in defence that this policy did not cover the guano charter; I informed him that the plaintiffs contended that it did, and covered nothing else; that they took
40 out a policy from New York to San Francisco, on the guano charter to Callao and Chinchas, and from there to Rotterdam and we were talking about the policy upon which this suit is based; that is, this insurance policy, the $10,700, policy; I told him I intended to take the point that that policy, that $10,700, did not cover the guano charter, but that the plaintiff's counsel contended—Mr. Shepley—that it did cover the guano charter, and that parol testimony would be admissible to show what charter was intended; that it was a latent ambiguity; I told Mr. Paulison that probably that question would be reserved by the presiding justice for the determination of the whole court as a preliminary question of law, and that I thought the case would turn mainly on that; that if they got liberty to put in parol testimony it would be very easy to anticipate what the verdict of the jury would be; after discussing the matter fully, Mr. Paulison, turning to his books and laying down considerable law that I did not exactly agree to, we finally concluded—he told me that he wished me to defend the suit at every point, to take every possible objection that could be made against recovery by the plaintiff, and avoid the payment of the loss; he told me that they would pay me for so doing; the next day, or the next day but one, at any rate on the 2d of November, if that is the date of the credit, I saw Mr. Whipple and Mr. Paulison again at The Sun Mutual Office, but in the mean time I had made some investigation upon the point of over-insurance with Mr. Whipple, and satisfied myself that there was no sufficient evidence of over-insurance, and I ascertained how their error arose.

By the COURT:

Q. Did you communicate this to Mr. Paulison?

A. I would not like to be positive about it, but I really have not any doubt, because it was to investigate those matters and discuss them with Mr. Paulison that I came here; I do not think I could have
41 failed to talk to him upon all those points, although I have no positive, distinct recollection.

By Mr. BENEDICT:

Q. About the over-insurance?

A. About the over-insurance; that seemed to be a very strong point with Mr. Whipple; I think more so than with Mr. Paulison.

By the COURT:

Q. Now, what occurred on November 2d?

A. The 2d of November I saw Mr. Whipple and Mr. Paulison again at The Sun Mutual Insurance Office; I told him I would do everything I could in the defence of the suit, and I did not know that it was any object for me to remain any longer; that I was very anxious to return; and Mr. Paulison asked me if I wished for any money; I recollect telling him that I was not particular about it, but for a certain reason, which I assigned to him, he might give me a hundred dollars if he pleased—that I could use it on the street; and he thereupon paid me $100, and I presume I gave him a receipt for it; he paid me that $100 for my services in this matter; of course I charged for my coming to New York, for my services and for my expenses.

By Mr. BENEDICT:

Q. Did you, as counsel, defend the suit for The Sun Insurance Company?

(Respondents' counsel objects to the question as calling for a conclusion of the witness. Question excluded. Libellants' counsel excepts. Libellants' counsel offers to show by this witness that he did go on in pursuance of the request and employment of the president of The Sun Mutual Insurance Company, and defend the suit on their behalf.)

The COURT. You can show that, but not by the witness saying that he did.

42 By Mr. BENEDICT:

Q. Did you, in pursuance of this employment of Mr. Paulison, defend the suit on behalf of The Sun Insurance Company as their counsel?

(Respondents' counsel objects to the question as calling for a conclusion of the witness instead of for the facts. Question excluded. Libellants' counsel excepts.)

Q. Will you go on and state what you did in the way of correspondence, or anything else, with The Sun Insurance Company with relation to the defence of that suit?

A. After I returned from New York in November, 1869, it was not found convenient to try the case at the January term, and it was set down for a hearing at the April term, 1870, of the supreme court at Portland; at that term both these cases were placed on the calendar for trial, and the suit upon the policy on the vessel was fully tried upon the facts.

Q. Before a jury?

A. Yes, sir; the facts were fully gone into, the loss of the vessel, etc.

Q. Who brought the action?

A. George M. Melcher; he had two policies, one on the vessel and one on the charter, etc.; a verdict was rendered for the plaintiff; at the same term the case of the suit upon the policy on the charter, primage, etc., for $10,700, was opened to the jury; the stenographer's report of the testimony in the prior suit, the facts being the same, were considered as in, and the plaintiff's counsel then proposed to introduce parol testimony, the testimony of some witnesses, and some written evidence, put in evidence extrinsic from the policy, to show that the charter mentioned in the policy was the guano charter; I objected to it, and after a long discussion over the matter, the presiding justice said that he would report the case to the full court for the determina-

43 tion of the question whether extrinsic evidence was admissible, and thereupon, as our mode of proceeding is, the case was made up and continued on the printed report of testimony and the questions of law that were reserved; that turned the case over to the law term, holden at Portland in July, 1870; the case was not argued at the July term, 1870; I was out of the country, and it was continued to be argued in writing within sixty days after my return, and it was argued some time in November; the case then stood from term to term upon the nisi prius docket and the law docket; on the 27th of November, 1871, a rescript came down that the plaintiff's evidence was admissible; in the mean time I had communicated to The Sun Mutual——

Q. Look at this (handing paper to witness).

A. "October 18th, 1870;" I wrote this letter to Mr. Paulison, of The Sun Mutual Company, addressed to him as president.

Q. What was that (handing witness another paper)?

A. That is an abstract of the points, not in my handwriting, but I recognize the handwriting.

Q. Was that sent in the letter?

A. Undoubtedly.

(Libellants' counsel offers in evidence the letter of October 18th, 1870, just shown witness, and the enclosed abstract of points. Received and marked Exhibits 17 and 17 A.)

Q. (Letter of October 6th, 1870, shown witness.)

A. With that I undoubtedly sent him a printed copy of the case—the first report.

Q. Look at that and see if that is it (handing paper to witness)?

A. Yes, sir; this was made up, April term, 1870.

(Libellants' counsel offers in evidence the letter of October 6th,
44 just shown witness. Received and marked Exhibit 15; enclosed printed copy of case is marked for indentification, 15 A.

(Libellants' counsel offers in evidence a letter of October 15th, 1870; from Mr. Paulison to Mr. Rand, replying to the letter of October 6th, 1870. Received and marked Exhibit 16.)

Q. (Handing paper to witness.) Is that a copy of the original letter?

A. This copy is made in New York; that copy is undoubtedly from The Sun Mutual Office.

By Mr. TAFT:

Q. I notice the name of A. J. & E. M. Rand; that is your firm name, I suppose?

A. Yes, sir.

By Mr. BENEDICT:

(Handing witness a letter.) That is your letter?

A. Yes, sir; I wrote that letter.

Q. (Handing witness a paper.) That is the opinion on the rescript of November, 1871?

A. Yes, sir.

(Libellants' counsel offers in evidence letter and paper just shown witness, being letter of January 16th, 1872, from Mr. Rand to Mr. Paulison, and an enclosure consisting of Judge Walton's opinion. Received and marked Exhibits 18 and 18 A.)

By Mr. CHOATE:

Q. You got a reply containing Mr. Butler's opinion?

A. I recollect getting a document signed by some one by the name of Butler.

(Libellants' counsel offers in evidence letter of January 29th, 1872,
45 from Mr. Paulison to Mr. Rand, in answer to the letter of January 16th, 1872. Marked for identification. Witness cannot prove the letter and it is withdrawn.)

By the COURT: Go on.

A. After the reception of that opinion, the opinion which was received on the 27th of November, the next term of the supreme court was in January, when the case was made up on the facts—the whole case; that is the printed report from which Mr. Choate read.

Q. You mean the case came on for trial before another jury?

A. Yes, sir; at the January term, 1872.

By Mr. TAFT:

Q. Is that the printed case then made up (handing witness a paper)?

A. Yes, sir; one of them; that was made up for a final decision of the case.

Q. The one you just now referred to?

A. Yes, sir; you will notice at the bottom of the second page: "The case was thereupon withdrawn from the jury and is submitted to the court, to enter such verdict as the law and evidence requires."

Q. This printed case I hold in my hand, was that made up at that time?

A. Yes, sir; in January, 1872.

By Mr. BENEDICT:

Q. That is the second printed case?

A. Yes, sir.

By the COURT:

Q. The case came on for trial January, 1872, before a jury?

A. Yes, sir.

By Mr. BENEDICT:

Q. What proceedings took place?

46 A. After the testimony was all brought out, which was substantially the testimony that was put in before, all the questions of every kind that could possibly be raised upon that evidence, it was agreed should be submitted to a law court; all the testimony was put in, subject to legal objections, and then the whole matter was submitted to the court for decision.

Q. And the case was made and printed?

A. Yes, sir.

Q. And this is the case; you identified it?

A. Yes, sir; it is headed January, 1872; the 15 A is entitled of April term, 1870; that was the case that was made up for the determination of the question of the admissibility of extrinsic evidence; after that question was decided the case was made up again for the final decision, and this second report is entitled of January term, 1872.

(Libellants' counsel offers in evidence the printed case of January, 1872, and it is marked for identification No. 19.)

WITNESS. (Continuing:) After the case was made up for the law court that was argued at the July term, 1872; the opinion of the court was received December 7th, 1872, the rescript being judgment for plaintiff for $9,200 and interest—interest from some time in 1864 or 1865; the reason judgment was not actually made and settled up at that time was on account of the pendency of the trustee process by Benjamin Melcher against George M. Melcher, and that was not finally disposed of so that judgment could be entered till some time in the April term, 1873, when judgment was entered for $7,800.

By the COURT:

Q. Was there not a third printed case?

A. No, sir; only two.

By Mr. BENEDICT:

Q. Did you send the opinion of Chief Justice Appleton?

47 A. I do not recollect; I think it very probable, but I do not recollect; I informed them of the opinion of the court, what it was.

By Mr. TAFT:

Q. Do you know whether that is a copy of it (handing witness a paper)?

A. I have no doubt that I obtained that paper from the reporter; it is attested by him.

Q. Did you know about the payment of the $8,000 policy by The Ocean Company to Charles S. Pennell?

A. No, sir; I have no personal knowledge of it.

Q. That did not come under your supervision?

A. No, sir; there was no controversy about that.

GEORGE A. WRIGHT, a witness called on behalf of libellants, being recalled, further testifies:

Cross-examination continued by Mr. CHOATE:

Q. Was there any communication between the two companies in respect to taking the risk which is the subject of this suit, except that in writing which has been produced?

A. Not that I know of.

Q. Was there any personal communication on either side?

A. No, sir; not to my knowledge.

Q. What insurance on the C. S. Pennell, on her freight or charter, or property on board of her, did The Ocean Company have?

A. Our primage?

Q. I mean when she was lost.

A. Under policy 24,500, taken February 26th, 1854, we had $8,000 war risk on the ship.

By the COURT:

Q. That is an open policy?

A. No, sir.

Q. Directly on the ship?

48 A. We had $8,000 war risk on the ship from New York to San Francisco, Callao, and Chinchas.

By Mr. CHOATE:

Q. For whom?

A. For Charles S. Pennell.

By the COURT:

Q. That was the name of the ship, too?

A. Yes, sir; and also under the same policy there was $8,000 marine risk on the charter for the same voyage for the same party; $8,000 war on the ship, and $8,000 marine on the charter.

By Mr. CHOATE:

Q. How is that charter described in that policy?

A. I could not tell you now.

Q. What memorandum have you got of it?

A. I took it from the policy.

Q. What is it?

A. Just as I have read it.

By the COURT:

Q. "Charter of the ship for the same voyage" was the way you read it?

A. Yes, sir; of course the policy would read a little differently from this—this memorandum that I took.

By Mr. CHOATE:

Q. Any other?

A. Under policy 24579 we took $3,000, both war and marine risk, on

the vessel from New York to San Francisco, Callao, Chinchas, and to Europe; that was for G. M. Melcher.

Q. What was the date of that?

A. March 24th, 1864.

Q. On the ship?

A. Yes, sir; then under policy 24580 there is $6,550 on the charter; $2,650 on the primage; and $1,500 on the property. That was for G. M. Melcher.

49 Q. And the dates of these policies, have you got them? Are they all of the same date, except the February one?

A. They are all as I have stated; the first one was February 25th, 1864, for $8,000.

Q. The 24579 one?

A. The 23d of March.

Q. The 24580 one?

A. The 23d of March.

Q. Is that all?

A. Yes, sir; that is all.

Q. After your reinsuring of the charter, $6,550, and primage, $2,650, did your company retain anything uninsured on that risk?

(Counsel for libellants objects to the question as calling for a legal conclusion of the witness.)

Q. After effecting with this company this policy in suit, what insurance did you have on the risk described in it?

A. I may be dull of comprehension, but I really do not understand what you mean.

Q. Well, you took a $6,550 policy on charter, and $2,650 on primage, and you claim to have reinsured that with this company?

A. Yes, sir.

Q. Having reinsured it, did you have anything else on that same risk?

A. No, sir.

Redirect examination by Mr. TAFT:

Q. You mentioned $8,000 insurance to C. S. Pennell, on charter?

A. Yes, sir.

Q. Now, is the $5,000 reinsured on the policy of The Sun Company to C. S. Pennell—is that reinsurance part of the $8,000?

50 A. Yes, sir; it is part of that $8,000 that I have mentioned under policy 24500.

(Respondents' counsel objects to the question, on the ground that the policy speaks for itself.)

Q. Was that $8,000 policy to S. C. Pennell paid by your company?

A. Yes, sir.

Q. What was the date of that payment?

A. By us?

Q. Yes.

A. That I do not remember.

Q. Well, were you repaid on account of that insurance by reinsurance from The Sun Company?

(Repondents' counsel objects.)

Q. What was the date of that payment from The Sun Mutual to you?

A. They paid us—that is, we received on October 23d, 1865, $2,500, and on May 5th, 1866, $2,500 additional, making the $5,000.

Q. Look at those I now show you, marked Exhibits 4 B and 4 C, and state whether you can give the terms in which you insured C. S. Pennell; can you state by that the terms which you insured for?

A. We insured just the same as those applications read, and they are signed by me.

Q. What was it The Ocean Insurance Company insured to Mr. Pennell under, 24500? That is the number of the policy that issued to Pennell and the only one?

A. Yes, sir.

Q. Can you tell by looking at this policy what you insured?

A. Yes; we insured the ship Charles S. Pennell.

(Respondents' counsel asks that Mr. Wright, on his return to Portland, may send slips copied from these policies of the C. S. Pennell descriptive of the risk.)

51 JOHN RAND, a witness called on behalf of libellants, being recalled, further testifies:

Cross-examination by Mr. CHOATE:

Q. You say you were counsel for The Ocean Company in both suits brought by Melcher in the supreme court in Maine?

A. Yes, sir.

Q. How early were you retained by The Ocean Company to defend those suits?

A. Immediately after they were commenced.

Q. Were you the regular counsel of The Ocean Company, independent of those suits?

A. I do not know whether I had done any business of any consequence for The Ocean Company before that time; I have been ever since—ever since the fall of 1866, or the summer of 1866.

Q. Did you continue to act as counsel for The Ocean Company in the defence of both those suits to their termination?

A. Certainly, I did.

Q. Both on the record and as counsel in court, your firm being attorneys of record?

A. Yes, sir.

Q. I observed by the case made up that you pleaded the general issue in the suit on the charter policy; by your practice in Maine does that plea admit of every defence being proved?

A. This was an action of assumpsit on the policy of insurance, and under general issue there are only four pleas that are not admissible.

Q. What four are not admissible?

A. Statute of limitations, tender, set off, and bankruptcy; so that every point that was material to the defence of this suit was open to the defence under general issue.

Q. When did you first know that before insuring Captain Mel-
52 cher on charter, The Ocean Company had had exhibited to it the letter from Captain Melcher to Mr. Sawyer, of March 20th, 1864, Exhibit E, on page 58, of the last printed case?

A. Of course I knew it at the April term, April, 1870; whether I knew it before it is impossible for me to recollect.

By the COURT:

Q. At the April term, 1870, you knew that that exhibit had been shown to The Ocean Company before they took the risk?

A. I knew it at time, because——

(Libellants' counsel objects. Respondents' counsel wishes to show whether, at the interview of November 2d, with the president of The Sun Mutual, witness knew it.)

WITNESS (continuing): I got the information at the April term, 1870, undoubtedly, because it appears in the report of the case; whether

I knew it before I am not certain; I have the impression that in conversation with Mr. Shepley, now Judge Shepley, he told me of it, but I am quite certain that there was no conversation between myself and Mr. Paulison in reference to that letter; the conversation related solely to showing by parol testimony or extrinsic testimony, without alluding to any particular kind of testimony.

By Mr. CHOATE:

Q. Had you not, in preparing for the case, before your conversation with Mr. Shepley, learned from The Ocean Company that such a letter had been exhibited to it, or such information conveyed to it by Mr. Sawyer, before they took the risk?

A. No, sir.

Q. When did you first learn of the other facts proved by Mr. Sawyer as having taken place between him and the officers of the company before the risk was taken?

53 A. I should be obliged to give you the same answer that I gave to your next but one preceding question.

Q. That you learned it for the first time at the April term trial, unless you got it at an interview shortly before?

A. Mr. Shepley and myself were in the habit of talking freely over cases——

Q. Mr. Shepley was counsel for Mr. Melcher?

A. Yes, sir.

Q. And how early do you think you learned it from Mr. Shepley?

A. Oh, I do not think anything about it; I can only state that I have a strong impression that in talking about the case, and what testimony would be introduced, that Mr. Shepley mentioned it, but I am not positive about that.

Q. Did he mention that before November 2d, 1869?

A. I cannot answer that question, I do not know whether he did or not; I did not tell you that he mentioned it at all.

Q. Have you any impression as to whether he mentioned it to you before November, 1869?

A. I could not say, it would be impossible for me to tell, whether we talked about it before I came to New York or not.

Q. Well, you are certain that in your conversation with Mr. Paulison, in November, 1869, in New York, you did not communicate to him any information as to the evidence, either as to that letter or conversation between Mr. Sawyer and Mr. Wright, about leaving out the word guano?

A. I did not say that; I told you that there was no conversation between Mr. Paulison and myself with reference to the letter; but the conversation between Mr. Paulison and me was as to their being at liberty to show extrinsic evidence of any kind.

54 Q. Did you communicate to Mr. Paulison any specific piece of parol evidence which you had heard was to be offered by the plaintiff?

A. I could not recollect the whole conversation; it is impossible for me to say; I could not say that I did, neither would I like to state that I did not; I can only speak definitely with reference to the letter, so far as my conversation with Mr. Paulison is concerned.

Q. Now, when you came to the final trial of the case in January, 1872, did you offer any evidence in opposition, or to contradict the parol evidence put in by plaintiffs?

(Libellants' counsel objects.)

Q. Do the printed books you have given contain full accounts of all the evidence given on both sides?

A. They do.
Q. And of all that was offered?
A. Yes, sir; I know them to be correct.

By the COURT:

Q. Of the evidence given at both the trials?
A. Yes, sir.

By Mr. CHOATE:

Q. When you tried the case did you have in your possession a copy of the San Francisco charter, called the coal charter of the C. S. Pennell, the charter from Pennell to Sutton & Co., to carry coal to San Francisco, dated New York, December 24th, 1873?
A. No, sir; I never saw the coal charter.

By the COURT:

Q. You say you had never heard of it?
A. No, sir; I had heard of it; I had never seen it.

By Mr. CHOATE:

Q. Will you please to state on what ground you did defend the suit after the court had decided that parol evidence was admissible?
(Libellants' counsel objects on the ground that the records will show.)

55 The WITNESS. The records will not show.
(Objection overruled.)

A. I can state the points that were taken on the defence, if you wish.
Q. Do so.
A. The points taken there were not the points taken at the nisi prius term, January, 1872; I was at liberty to take any points I pleased before the law court.
Q. You have a copy of your points?
A. I think you have one.
Q. Is this it (handing witness a paper?)
A. Yes, sir.
Q. That embodies the points you made after the evidence was all in; those were the points taken to the law court?
A. Yes, sir.
(Respondents' counsel offers the points in evidence. Received and marked Exhibit 20.)
Q. Did you contest the point that upon the parol evidence which the court admitted the charter described in the policy of The Ocean Insurance Company meant the guano charter?
A. No, sir; I did not contest that point; I never had any doubt about it at all as a lawyer.
Q. I want to ask your judgment, as a lawyer, whether the case did not go against the Ocean Insurance Company wholly upon that point?
(Libellants' counsel objects.)
A. I suppose the opinion of the court will — it will have to stand on the opinion of the court; if the extrinsic evidence had been shut out, there would have been an end to the case; there is no doubt about that.
(Libellants' counsel objects to the testimony.)

56 Q Is it not your present opinion that if the extrinsic evidence had been shut out, the case must have been decided against the plaintiff?
(Libellant's counsel objects. Question excluded.)

Q. Did you endeavor at the trial to obtain evidence from the company to contradict the parol evidence offered by Mr. Sawyer?

(Libellants' counsel objects to the question as immaterial. Objection overruled.)

A. Mr. Woodbury, president of the company, had died; I ascertained that there was no other person who knew anything about the conversation between him and Mr. Sawyer.

Q. Why did you not call Mr. Wright to contradict what Mr. Sawyer testified as to the conversation between himself and Mr. Wright, at the time of taking the policy?

(Libellants' counsel objects to the question, as assuming that the printed document is in evidence, and that there was such a conversation. Objection overruled.)

A. What part of the evidence was it?

Q. Page 29, of No. 19, January term, of 1872.

A. Do you refer to the statement on the top of page 29?

Q. Yes. (Reading from testimony.)

A. Now, you ask me why I did not call Mr. Wright to contradict that statement?

Q. Yes.

(Libellants' counsel objects. Objection overruled.)

A. The principal reason was, that the fact stated there was of no consequence—was of no consequence to me.

By the COURT:

Q. You did not regard it as of any importance as affecting the plaintiff?

57 A. I did not consider it of any importance to the defendants' defence.

By Mr. CHOATE:

Q. Had you, before Mr. Woodbury's death, ascertained from him whether the interviews and conversations, testified to by Mr. Sawyer, took place?

A. No, sir; I never had any conversation with Mr. Woodbury in reference to the facts of this case; the case did not progress so far during his life as to make it important for me to prepare for the trial.

Q. Upon the trial in Maine, was it not in proof that there was a charter of this vessel from New York to San Francisco?

(Libellants' counsel objects.)

A. If the book so shows; I cannot state without looking at the book; it is some time since this case was tried; I think, though, you will find it in the testimony of Captain Melcher that he had a coal charter, whatever is in the book.

Q. Did you contend upon the trial or argument that the description contained in the policy of The Ocean Insurance Company, would apply to the coal charter?

(Libellants' counsel objects. Ojection overruled.)

A. Well, at which law argument—that in July, 1870, or the one in July, 1872?

Q. July, 1872.

A. You have my brief.

Q. You argued something besides that brief; you made an oral argument.

A. Oh, yes; I argued much more than the brief; it is a mere sketch.

Q. Well, did you contend that the description in the policy of The

Ocean Company would apply to and be satisfied with the coal charter?

A. I undoubtedly did so contend.

58 Q. On that argument?

A. The argument of July, 1872?

Q. Yes.

A. I think very likely.

Q. After the parol evidence had been admitted?

A. Yes, sir; I think it very likely that I did; I pressed every point that I could possibly get up.

By the COURT:

Q. Would it not be in your points then?

A. Oh, it might not; I minuted on my brief the points to which I specially wished to call the attention of the court, but I might allude to many matters orally, which, if they struck the court with any effect, it would make a note.

By Mr. CHOATE:

Q. Do you remember insisting on that point with any strength?

A. Oh, I don't remember in the argument.

Q. Don't you remember that you thought that was impossible after the parol evidence had been received?

A. I suppose among lawyers it is pretty well understood that they are in the habit of taking points that they have not any great confidence in.

Q. Well, you had no confidence in that point?

A. After the court admitted the parol testimony, I had no expectation of winning the cause for The Ocean Insurance Company, upon the ground that the policy did not apply to the guano charter; of course I had not; there is no difficulty in anybody's drawing that inference from the opinion.

Q. Prior to your visit to New York in November, 1869, had you had any communication with The Sun Insurance Company, or with any of its officers, in respect to the subject-matter of the loss of the C. S. Pennell, or to the insurances upon it?

59 A. I would not like to be positive about that; there had been a great deal of correspondence, principally with Mr. Whipple, who appeared to be acting for the concern; whether I had received any communication directly from The Sun Mutual Office I do not recollect; I have a strong impression that I had, but I would not be positive.

Q. A written communication?

A. Yes, sir; it must have been written, because I never had seen any officers of The Sun Mutual Insurance Company until I came to New York, in the latter part of October or the first of November, 1869. I had seen Mr. Whipple.

Q. Well, it was upon Mr. Whipple's invitation you came to New York, was it not?

A. No, sir; I am not prepared to state that exactly in those words, because Mr. Whipple's letter asking me to come to New York, purported to be on behalf of The Sun Company, as well as those that he represented. I should not have come to New York upon the invitation from the Washington Company, that he had gone up.

Q. Have you got that letter?

A. Yes, sir; I think so.

Q. You have not got it here.

A. No, sir, I did not bring any letters here; I did not suppose that they would be of any consequence.

Q. How long did your first interview on the 2d of November, 1869, with Mr. Paulison and Mr. Whipple last?

A. That was not the first interview?

Q. Which was the first interview.

A. Why the day before, or the day before that.

Q. Well your first interview, without reference to its date; how long did it last?

A. Oh, I probably got down to Wall street at half past ten, or so; it took me some time to get down from the Hoffman House; I could not tell with any definiteness how long; we talked it over fully as
60 long as any of us had anything to say about it; I was undoubtedly there a couple of hours; I do not know but more.

Q. How long did the next one last?

A. I do not know.

Q. Well, about?

A. I could not tell.

Q. Five minutes, or five hours?

A. I do not know.

Q. How long did the next one last?

A. Well, I think that lasted about an hour.

By the COURT:

Q. When you got your money?

A. Yes, sir.

By Mr. CHOATE:

Q. Did you have any other interviews with Mr. Paulison after those three and before the trial?

A. After those three and before the trial?

Q. Of January, 1872.

A. No, sir, I think not; I am quite certain—I do not think I had; I have no recollection, unless it could be recalled in some way; I have no recollection of being in New York on this business, but I am not certain; I cannot say; you have that account of mine; it will show if I was in New York, because if was here in New York I would charge for it.

Q. Have you testified to all that you remember of the conversation at those three interviews between yourself and Mr. Paulison?

A. Those three days?

Q. Those three days.

A. Yes, if there were three days.

Q. I mean all the interviews you had with him.

A. I will testify to anything that occurs to me; if you can recollect anything, I will state to you what I recollect or know about.

Q. Have you endeavored to state all you recollected on the direct examination, or that you could recollect?

61 A. Yes, sir; I believe so; I intended to.

Q. What was the last thing said by Mr. Paulison to you on the last interview, before the subject of paying you the $100, came up?

A. I do not recollect; it is impossible for anybody.

Q. You don't recollect it in substance?

A. No, sir; if you or Mr. Paulison can in any way remind me, I will tell you; my impression is quite strong that after we had talked about the matter, the final conclusion was, "Well, I want you to—" he asked me to do all I possibly could in the case, and contest every point, and I told him I would.

Q. That was the same purpose that you had before you came?

A. That is, that I had the same purpose to contest every point?

Q. Yes, sir.
A. Oh, yes; there is no doubt about that.
Q. You were employed for that by The Ocean Company?
A. Yes, sir.
Q. And the understanding between you and The Ocean Company, was to do so?
A. They understood perfectly well, when they employed me, what course I should take.
Q. Did you receive any communications from Mr. Paulison after those conversations, in writing, prior to the decision of Judge Walton, admitting the parol evidence, except what has been produced?
A. I could not say.
Q. Do you recollect of any?
A. I could only determine that by running over my files of letters.
Q. You do not now recollect of any?
A. I don't recollect anything about it; I don't recollect whether I had any or not.

62 Q. When you sent him Judge Walton's opinion on the 16th of January, 1872, you shortly afterwards received from him a reply admitting its receipt and covering the opinion of a lawyer, did you not?
A. I received a letter from Mr. Paulison containing sheets of foolscap signed by Butler; yes, sir; I received some communication.
Q. In substance that is a copy (handing witness a paper)?
A. I could not tell; I have no definite recollection; I could not state whether that is the same or not; I wrote to Paulison on the 5th of February, 1872, an answer to the letter in which he enclosed me Mr. Butler's document.
(Respondents' counsel offers in evidence letter from Mr. Paulison to Mr. Rand, of January 29th. Received and marked Exhibit 21.
Also opinion of Butler enclosed in Exhibit 21. Received and marked Exhibit 21 A.
Also letter from Rand to Paulison, of February 5th, 1872. Received and marked Exhibit 22.)
Q. Did you send this letter to Mr. Paulison of July 12th, 1872 (handing a paper to witness)?
A. Yes, sir.
(Respondents' counsel offers in evidence the paper just shown witness. Received and marked Exhibit 23.)
Q. You got a reply to that (handing witness a paper)?
A. I should think that was a copy of the reply; at any rate, it was in that general tenor.
(Respondents' counsel offers in evidence letter last shown witness, being of date July 15th, 1872, from Paulison to Rand. Received and marked Exhibit 24.)

63 Q. Then this is your reply to that (handing witness a paper)?
A. Yes, sir; I recognize only part of that letter.
(Respondents' counsel offers letter last shown witness in evidence, being of date July 16th, 1872, from Rand to Paulison. Received and marked Exhibit 25.)
The WITNESS. There was an intermediate telegram, telling me not to draw.

By Mr. BENEDICT:
Q. Was there not a reply got by yourself after that?
A. I think I wrote the last letter.

By Mr. CHOATE:

Q. Then after the final decision these letters passed (handing witness papers)?

A. Yes, sir; I wrote that letter (one of the letters) December 23d, 1872; whether that is a copy of the answer of course I cannot tell; then I wrote the letter of January 30th, 1873, and came to New York with the evidence.

(Respondents' counsel offers in evidence letters last shown to witness. Received and marked, the one of December 23d, 1872, Exhibit 26; the one of January 24th, 1873, Exhibit 27; and the one of January 30th, 1873, Exhibit 28.)

Q. Then after writing the letter of January 30th, 1873, you came to New York?

A. Yes, sir.

By the COURT:

Q. And brought the papers?

A. Yes, sir; I brought a copy of the judgment and all the other papers having any bearing on the case.

Q. Put them into the hands of counsel here, you mean?

64 A. No, sir; I brought them to Mr. Paulison.

By Mr. CHOATE:

Q. You called on Mr. Paulison and presented them?

A. Yes, sir.

Q. Then he took you to the counsel of The Sun Company, and you talked the matter over with them?

A. Yes, sir; I went upstairs, I think, in the same building, and saw Mr. Butler and talked about it, and Mr. Butler wanted to look it over and talked a great deal about it, and said he would be prepared to give a definite answer in the morning, and I got Mr. Paulison and Mr. Butler to give a time when they would be prepared to give an answer, and I went into The Sun Mutual Office, and Mr. Paulison, I think, had not seen Mr. Butler; he wanted me to go upstairs to see Mr. Butler, but I told him I did not think I should trouble myself about Mr. Butler any more, and then I asked Mr. Paulison if he would pay me the amounts of those items; he declined.

By the COURT:

Q. What amount?

A. The amount of this claim; the judgment and the expenses; I had a bill of the expense; I was willing to explain the matter to him fully.

By Mr. TAFT:

Q. What was the date of that?

A. Well, I cannot tell; I then stated to Mr. Paulison that I, on behalf of the Ocean Company, demanded of The Sun Mutual the amount; he declined paying it and I bade him "good morning."

By Mr. CHOATE:

Q. In your account of the conversation with Mr. Paulison did you say to him that Captain Melcher had taken out a policy in New York on his guano charter from San Francisco and the Chinchas, and thence to Rotterdam?

65 A. No, sir; nothing of the kind; I never heard anything of the kind—that he had anything on his guano charter except the Ocean.

Q. You did not mean to say that Captain Melcher or anybody else took out a policy in New York from San Francisco?

A. Oh, no, sir.

Q. Why did you not put in evidence the San Francisco charter on that trial?

A. Because I did not consider it material.

Redirect examination by Mr. BENEDICT:

Q. How long have you been practising law?

A. Nearly thirty-six years.

Q. In Portland?

A. Yes, sir.

Q. Did you conduct this defence on the part of The Ocean Insurance Company as counsel at the bar?

A. Yes, sir.

Q. At nisi prius and before the law court?

A. Yes, sir.

Q. You did everything you thought was possible to save the case?

A. Yes, sir, everything that was becoming to do; I think it proper that I should state—as Mr. Choate asked me a few minutes ago if I recollected any further conversation with Mr. Paulison in November, 1869, other than what I stated—that, upon seeing that letter of mine in which I allude to his saying that he would furnish me any fees at any time, I have a distinct recollection that he so stated.

By Mr. TAFT:

Q. Were you present at the time this Ocean Insurance Company policy was issued?

A. No, sir.

Q. You know nothing that transpired at that time?

A. No, sir.

66 Q. The understanding was that you were counsel of the Ocean Company at the time you came on to New York and saw Mr. Paulison in November, 1869?

A. Yes, sir.

Q. That fact was then known to Mr. Paulison?

A. Oh, yes, sir.

Q. Was the last interview you have spoken of with Mr. Paulison as late as August, 1873?

A. I can only tell by reference to the letters that were shown a short time ago.

Q. (Witness shown letter of January 30th, 1873.)

A. I came on—at the close of this letter I say, "probably at the latter part of next week."

Q. And you came on shortly after that?

A. Yes, sir.

Q. It was at that time you made the demand on Paulison on behalf of The Ocean Insurance Company that you have testified to?

A. Yes, sir.

Q. To pay the judgment and expenses?

A. Yes, sir.

Q. The amount of the recovery had been fixed?

A. Oh, yes; we knew the exact amount.

By Mr. CHOATE:

Q. You did not go away after the company had paid?

A. No, sir; in January, 1873, he told me they would not pay.

(Libellants' counsel produced two other policies, called for by respondents' counsel, which are put in evidence by respondents' counsel —No. 24500, marked Exhibit 29; and No. 24579, marked Exhibit 30.

Libellants' counsel offers in evidence the guano charter, on page 63, of the printed Maine Case, Exhibit 19; and on page 54, of Exhibit 15 A, which is received in evidence.

67 It is admitted that the premium on the policy of insurance sued on in this action has been paid.)

Libellant rests.

(Respondents' counsel offers in evidence the two printed cases, produced by Mr. Rand, showing the proceedings upon the trial in the case of Melcher vs. The Ocean Insurance Company, marked Exhibits 15 A and 19; as evidence of what took place on the trial in Maine.

Libellants' counsel objects to the competency of anything that took place in Maine, more than the judgment.)

The COURT. I admit this. It has been testified to by Mr. Rand, as the evidence of what took place on the trial, and as showing what was litigated in that suit.

Libellants' counsel excepts.

(Respondents' counsel also offers in evidence the printed points of Judge Rand, already marked Exhibit No. 20.

Admitted, subject to the same objection. Respondent's counsel also offers the written points, marked 17 A, already put in evidence by the libellant.

Respondent's counsel also offers the opinion of Judge Walton, of the supreme court of Maine. Marked Exhibit 18 A, already in evidence by the libellant.

Respondent's counsel also offers in evidence a copy of Jude Appleton's opinion, marked Exhibit No. 31.

Respondents' counsel also offers in evidence copy of the charter of the C. S. Pennell, from New York to San Francisco, dated December 24th, 1863, marked Exhibit 32.)

68 JOHN P. PAULISON, called by the respondent, sworn.

Examined by Mr. CHOATE:

Q. You are president of The Sun Mutual Insurance Company?

A. I am, sir.

Q. When did you become president?

A. I think it was in April, 1869.

Q. Prior to that date, what, and for how long had you been connected with The Sun Company?

A. I went into The Sun Company as vice-president in January, 1867.

Q. Do you know personally who were the executive officers of The Sun Company in the month of March, 1864?

A. I think I do.

Q. Were you connected with the company at that time?

A. No, sir.

Q. You had large dealings with the company at that time as broker and adjuster?

A. I may have had.

Q. Who were the president and vice-president of the company in March, 1864?

A. I think Moses H. Grinnell was president, and J. Whitehead, vice-president, and E. R. Anthony, secretary.

Q. Did Mr. Grinnell continue to be president until you became president?

A. Yes, sir.

Q. Do you know the fact of Mr. John Whitehead's death and when it occurred?

A. I know that he has been dead for some years; I don't know exactly how long.

Q. It was some time before you went in as vice-president?

A. Yes, sir.

69 Q. Mr. Anthony became vice-president on Mr. Whitehead's death?

A. Yes, sir.

Q. State whether you received, in due course of mail, after October 6th, 1870, the letter which has been marked Exhibit 15, from Mr. Rand, and the printed case which is marked 15 A.

A. I received from Mr. Rand the printed case which I hold in my hand, and this letter.

Q. In due course of mail, after October 6th, 1870?

A. Yes, sir.

Q. When did you, or so far as you know, any person on the part of The Sun Insurance Company, have knowledge, or know, or have any information what testimony Captain Melcher offered or intended to offer in support of his claim in the case in Maine?

(Objected to. Admitted. Exception.)

A. The first knowledge that I had of that testimony to which you refer——

Q. I ask you the date when you first had knowledge of that testimony?

A. When I received the printed statement from Mr. Rand.

Q. The first knowledge you had of what?

A. Of any such testimony.

Q. As what?

A. As is reported in this document, 15 A.

Q. Before that, had you any knowledge of the letter from Captain Melcher to Mr. Sawyer, that appears to have been put in evidence in the case in Maine?

A. I had not.

Q. Or that that was communicated or was claimed by Melcher to have been communicated to The Ocean Insurance Company at the time of the original insurance?

A. I had not.

70 Q. Did you, before the receipt of the letter, Exhibit 15, ever hear of the other facts testified to by Mr. Sawyer on that trial?

A. I did not.

Q. From the time you became president you conducted the entire intercourse with Mr. Rand, yourself, on the part of this company?

A. Yes, sir; I did.

Q. I see on this letter certain words in pencil; are these in your handwriting?

A. These words in pencil were written by me.

Q. When?

A. At the time this letter was received by me, I think.

Q. (Reading:) "Printed report handed to Mr. Butler; for answer to this see letter-book." Who was Mr. Butler, and what does that mean?

A. Mr. Charles E. Butler, our counsel for The Sun Company.

Q. You handed the report and the letter to him?

A. Yes, sir.

Q. And your next letter to Rand has been put in evidence already?

A. I suppose so.

Q. And that was written after you handed the report to Mr. Butler?

A. Yes, sir.

Q. What is the date of that?
A. October 15th.
Q. You remember Mr. Rand's visit to New York, in November, 1869?
A. I do.
Q. Do you remember having various conversations with him in company with Mr. Whipple, or conversations with him alone?
71 A. I don't remember having any conversation in the presence of Mr. Whipple; I remember having conversations with Mr. Rand.
Q. Mr. Rand has testified, that in one of these conversations, you told him that you wished him to defend the suit at every point (referring to the suit in Maine); to take every possible objection that could be taken against the recovery, and to avoid payment of the loss, and you told him that The Sun Mutual Insurance Company would pay him for so doing. Do you remember a conversation in which the subject of money or payment to him was spoken of?
A. Yes, sir.
Q. State how you recollect it.
A. I think Mr. Rand, when he came to see me at the first interview I had with him in November, 1869, said he was defending this suit; I don't remember any such language as has been repeated, at all.
Q. I want your recollection of the language used, or the substance of it?
A. I don't remember using any such language as that.
Q. I want it as you remember it—on the subject of paying him?
A. I don't think that I ever used such language to him; I don't recollect it, and I doubt whether I ever did.
Q. What do you recollect of being said between you and him on the subject of paying him?
A. I did pay him $100 at that time; I think it was for his expenses in coming on from Portland, to confer with me in relation to this matter.
Q. Mr. Rand subsequently testified, that in the same conversation you observed that any funds called for on account of fees and disbursements would be furnished at any time?
A. I don't recollect of using any such language.
72 Q. Do you recollect saying anything of that kind to him?
A. I don't recollect anything about paying him money; I may have asked him to defend the suit to the best of his ability, and use all the points—believing at the time they were defending themselves against the payment of loss on the same risk we had taken with them.
Q. Do you recollect ever saying to him that any funds called for on account of fees or disbursements would be furnished?
A. I don't recollect that.
Q. When Mr. Rand had this conversation with you in November, 1869, what did you understand was his relation to The Ocean Insurance Company in the litigation with Melcher, in Maine?
A. Mr. Rand was the counsel of the Ocean Company; I so understood it at the time from him.
Q. Did he present himself to you in that capacity?
A. He did, of course.
(Objected to.)
Q. What did he say about his being counsel for the Ocean Company in Maine, and defending the suit there for them?
A. I don't recollect that the question came up whether he was counsel for the Ocean Company or counsel for The Sun Company, but in a pre-

vious letter he had called himself counsel for the Ocean Company, and I considered him so.

Q. When you paid him $100, on what service did you understand that was paid?

(Objected to.)

A. My best recollection is, that that $100 I gave him to pay for his expenses in coming on from Portland.

Q. He has said that he thinks he gave you a receipt for it.

73 A. He did; I have a copy of it here.

Q. In the office of the company do you find the other contract—the insurance on the C. S. Pennell, made prior to this insurance for the Ocean Company?

A. I find on this policy the entry——

Q. I mean the Conroy and O'Connor risk?

A. I found on inquiry that The Sun Company had taken a risk for Conroy and O'Connor.

(Objected to as immaterial.)

Q. Did you find the application?

A. I didn't look for it; I have not got the application with me; I suppose the application can be produced; I have not looked for it myself.

Q. I will ask you to get the original application; I ask you again whether, at the time of this conversation with Mr. Rand in 1869, you had any information whatever as to the existence of the facts put in evidence by Mr. Sawyer subsequently on the Maine trial—the facts of the Melcher letter, and the conversation between Sawyer and Woodbury, at the time of the original insurance?

A. At this time, when I saw Mr. Rand, in November, 1869?

(Objected to and question withdrawn.)

Q. In the conversation did Mr. Rand communicate to you any specific piece of parol evidence that was offered, or expected to be offered, on the trial in Maine?

A. He did not.

Q. At the time of the conversation, had you any knowledge or information as to the existence of the facts, which were subsequently testified to, by Mr. Sawyer on the trial?

A. No, sir.

Q. Especially the Melcher letter, and the conversation with Woodbury?

A. No, sir; I had not.

74 Cross-examined by Mr. BENEDICT:

Q. Produce this receipt.

A. Here (producing receipt).

Q. Is this a copy?

A. I believe it is a perfect copy from the receipt-book.

(Paper dated November 2d, 1869, read in evidence, and marked Exhibit 33.)

Mr. Benedict inquired of the court if he had taken down what the witness stated he said to Mr. Rand.

Judge BLATCHFORD. I have not.

(To the witness.) What did you say you stated?

A. I think I told him to do the best he could in defending The Ocean Insurance Company, thinking that we were interested from the information that he had given to me by reason of the risk we had taken; which I found out afterwards was a different one; which I did not know at the time, that their risk was a dissimilar one from ours.

DANIEL DRAKE SMITH, called by respondent, sworn.

Examined by Mr. CHOATE:

Q. You are a marine underwriter?

A. Yes, sir.

Q. And have been for how long in that business in this city?

A. Upwards of twenty or twenty-three years.

Q. In connection with what company now?

A. I have been president of the Commercial Mutual Insurance Company for about twenty-three years.

Q. And are still?

A. I am still.

Q. Are you familiar with the usage prevailing in that business?

A. I believe that I am, sir.

75 Q. With the terms employed in the business—the technical terms?

A. Yes, sir; I think so.

Q. Is there a usage in that business as to the manner of describing charters in applications and policies, where an insurance is applied for, and taken on charters?

(Objected to as immaterial, on the ground that the application was made in Maine. Admitted. Exception.)

A. I will say yes, there is a usage.

Q. Now, I ask you to state what that usage is, and how, in accordance with it, the charter is described in the application and policy.

(Objected to. Withdrawn for the present.)

Q. Look at Exhibit No. 4 A, and state whether in the business of marine underwriting, the terms there used, "$6,550 on charter, $2,650 on primage, and $1,500 on property on board ship (vessel named), at and from New York to San Francisco," has a meaning understood by people engaged in that business?

(Objected to as incompetent, and that the witness cannot prove the construction of the application in this way. Secondly, that the question does not state what people it means. Admitted. Exception.)

A. Yes, it has a meaning.

Q. What is that meaning as understood and used in the trade?

(Objected to as incompetent, to construe the words by parol testimony.)

Judge BLATCHFORD. If you propose to show that in receiving such an application, he would understand by the words, all together, that the charter spoken of in it was a charter, beginning at New York,

and terminating at San Francisco and having nothing else to do, in

76 and about the charter, I don't think such evidence is competent, because that is a question for the construction of the court; it is a written instrument; I don't think parol evidence can affect the question; if you mean to show that so much on charter means so much on the freight money received by the charter, that will be competent.

Mr. CHOATE. My object in this question is, I understand that a universal usage exists in an application and policy on charters to insert the limits of the route of the charter in the application and the policy, and I expect to prove it by this witness and by others.

Judge BLATCHFORD. I think such evidence is very unsafe, because you might have a case of this kind, where both parties understood what the charter was, and yet it was not expressed in the policy that the charter was much longer than the voyage to be insured, and they insured only a part of it; that would open the way for saying as this was

a universal usage the policy was good for nothing because it did not state the entire duration of the charter.

Mr. CHOATE. I expect to prove that the universal custom is to state the charter with its limits, and if only a part is intended to be insured, to state that part.

Judge BLATCHFORD. Then that comes to a case of suppression. I think I will exclude the testimony.

(Respondent excepts.)

Q. According to the usage which you have stated to exist, is it usual in the business of maritime underwriting to insert in the application and the policy the limits and route of the charter in the case of an insurance on charter?

(Objected to on the ground that the meaning of the application cannot be proved in this way. Objection sustained. Respondent excepts.)

77 Q. According to the usage which you have stated to exist in the case of an insurance of a protracted charter, or any charter for a part of the route is it usual to describe in the application and policy the charter and the part of the route over which the risk upon that charter is taken by the company?

(Objected to on the same ground as before. Excluded. Respondent excepts.)

Q. In the case of two charters, one for an extended route, and the other for a fractional part of that route, and the parties in interest insure the charter with no description, except that of the fractional part of the extended route covered by the lesser charter, to which charter would that description be understood to apply?

(Objected to on the same ground. Excluded. Exception.)

Q. In the business of marine underwriting, is insurance ever made for a party who has two charters, one for the complete employment of the ship for carrying purposes from A to B, and another from A to B, thence to a third port for cargo to carry to a port beyond, insurance to cover the second and subsequent charter over the route from A to B, which is filled by the first charter.

(Objected to.)

Mr. CHOATE. I propose to show now a wholly different thing from the meaning of terms.

Judge BLATCHFORD. The very question in this case is, whether that was done; now, because nobody else ever did it, that is no reason why, in this case, it may not have been done, if it was.

Mr. CHOATE. We think it is prohibited by law; now, I propose to show it is prohibited by custom.

(Excluded. Respondent excepts.)

78 Q. In your judgment as an underwriter, where a party seeking insurance has two charters, one from A to B, which fully occupies his vessel over that route, and the other from A to B, and ports beyond, from which to take a cargo to still further ports, is it material to the risk that in applying for insurance on charter at and from A to B he should disclose to the underwriter the existence of the more extended charter if he intends to insure that over the route from A to B?

(Objected to as a legal proposition.)

Judge BLATCHFORD. Of course, it is material to the risk that he should disclose the charter that he intends to insure.

(Objection sustained. Respondent excepts.)

Q. In the case of two charters, such as described in the last question, is it material to the risk that the application for insurance upon the charter should disclose the existence and the termini of the two charters?

(Objected to. Admitted. Exception.)

The WITNESS. Please to repeat.

Judge BLATCHFORD. The question is this, as I understand it: There are, in fact, two charters in existence, one is from port A to port B; the other charter is from port A to port B, and beyond port B, from which to take cargo to other ports. Now, a man comes to your insurance company and applies simply for insurance on charter. Is it important that he should disclose the existence of both of these charters and the termini of these charters?

Mr. CHOATE. Allow me to suggest the other circumstance, that the other charter employs the full capacity of the ship from A to B. That is important to show that she could not be used for the second charter from A to B.

Judge BLATCHFORD. We will take that limit. The first charter does fully occupy the vessel from A to B; the second charter is from
79 A to B, and ports beyond B, from which ports beyond B to take cargo to still further ports. Now a man comes to you and applies for insurance on the charter; is it material to the insurance company, in respect to the risk, that they should have disclosed to them the fact that there are two charters, and the routes of the charters, and the termini of them; that is, as to taking it, or as to the amount of premium, or anything connected with the risk?

(Objected to. Admitted. Exception.)

A. In my judgment it would be material and necessary that the applicant for an insurance should state which charter it was that he desired to have insured.

Q. Explain in what manner it is material to the risk?

(Objected to.)

Mr. BENEDICT. The witness has not answered the question at all, and he is now asked for an explanation.

Judge BLATCHFORD. Answer the question more distinctly. Is it material to the risk that he should disclose the existence of the two charters and the termini of the two charters?

A. Yes, sir.

By Mr. CHOATE:

Q. Explain in what manner it is material to the risk, either in respect to taking the risk at all or as affecting the right rate of premium.

(Objected to. Admitted. Exception.)

A. If the underwriter would be willing to accept the risk in that way it might affect the rate of premium to be charged.

Judge BLATCHFORD. I don't understand you.

The WITNESS. If I am permitted to explain, perhaps I may make my meaning plainer.

Judge BLATCHFORD. How is it material to the risk?

A. The insurance, as I understand it, relates to two charters;
80 the condition of these charters may be different; the liability of the underwriters therefore might vary on the two different charters.

Q. Would it in this particular case?

A. If your honor will allow me to explain: On a charter for the carrying of cargo from New York to San Francisco the vessel might be compelled to put into a port of distress and there be condemned; it might be possible for the cargo of the vessel under that charter to be forwarded from the place of condemnation to the port of destination at an expense less than the original charter, so that there might be a

saving to the underwriters on the charter; whereas, in the case of the other charter, as I understand it from what has been said here, there being no cargo on board, under that charter it would be a total loss without saving; there would be nothing to be forwarded to the first port named in the charter. In one case the underwriters would have the benefit of a possible salvage, while in the other there could be none.

Q. Do you speak of that as affecting the rate of premium?

A. Yes, sir.

Q. How?

A. But I said at first that if the underwriter would accept such a risk at all.

Q. Which would be the higher rate?

A. That in which there would be no possibility of saving any in case of a loss.

Q. Can you give us an idea of the comparative difference of premium on two such insurances—one being on a charter from New York to San Francisco, and the other for that portion of a charter extending beyond San Francisco to Callao, hence to the Chincha Islands, hence to Rotterdam and other ports in Europe. That is, suppose you take the San Francisco charter at a given rate per cent., how
81 much proportionably would be the increase over that for taking the more extended charter for a part of the route from New York to San Francisco?

(Objected to. Admitted. Exception.)

A. The fixing of a rate of premium depends upon the individual judgment of each underwriter in each particular case that is brought before him; therefore, I feel as though I could not state what would be a proportionate additional rate of premium for insuring one charter instead of the other; I think I stated in the beginning of my answer to that question that if an underwriter would accept such a risk there would be an additional rate of premium, the underwriter knowing that there were two charters existing, which might be different in their terms and which might cover different voyages if he would accept without knowing which charter he was going to insure.

Q. You say that if the underwriter would be willing to accept such a risk on which there was no possibility of salvage, it would be for a higher premium. What do you say as to its being material in determining the underwriter as to whether to take the risk at all or not?

A. Well, in this particular case it might be regarded as a double insurance.

Q. How so?

A. The understanding would be to insure the hire of the vessel from New York to San Francisco, and not only that, but to insure the hire of the vessel for a subsequent voyage from the Chincha Islands to Rotterdam. It would be an application to insure a greater amount than was actually at risk.

Q. Explain that a little more fully. You have said it would make a double insurance and take more than was really at risk.

82 A. I understand the amount of the insurance effected on the charter to be more than the amount actually at risk or to be earned under the charter from New York to Sar Francisco. To that amount is added the amount to be earned on some subsequent voyage; so that in case of a loss between New York and San Francisco, the assured would recover a larger sum than would have been actually earned

on the cargo if the vessel had arrived at her port of destination, San Francisco.

Q. Now, let me ask you whether, in your judgment, a prudent underwriter in such a case of two charters, knowing that the first appropriated the entire carrying capacity of the vessel from New York to San Francisco, or from A to B, would make insurance upon the other charter over the route from New York to San Francisco?

(Objected to. Excluded. Exception.)

The COURT. That is hardly competent; anything that goes to show it is material to the risk and would affect the taking of the risk at all, is competent undoubtedly.

Mr. CHOATE. I offer it in the latter light.

The COURT. This question of prudence is a matter of degree; some people think they are very prudent, and have been so all their lives, while every one else thinks they are very rash.

Mr. CHOATE. I put it in a different light; I mean it in reference to the last phase your honor has suggested.

Q. In such a case of the two charters would it, in your judgment, determine an underwriter as to taking the risk on the second charter for the route covered by the first one or not, if it were disclosed to him that the first charter absorbed the entire carrying capacity of the vessel over the route?

(Objected to.)

Judge BLATCHFORD. I have modified your question a little in order to avoid what would be perhaps an objection. (To the witness.) In such a case of the two charters, is it, in your judgment, material to the
83 risk in determining the underwriter as to taking the risk on the second charter on the route covered by the first one or not that it should be disclosed to him that the first one absorbed the whole carrying capacity of the vessel or not? I will allow the question in that shape.

(Libellants except.)

A. I think it would be material, sir; an underwriter would scarcely be willing to allow the assured to elect, after the happening of a loss, which subject of two subjects his policy should apply to.

Q. Under the circumstances to which the first one points, that under the first charter the vessel was earning under that charter all she could?

A. A prudent underwriter would at least hesitate to insure such a risk.

Q. Explain what you mean by such a risk?

A. An additional risk to the amount which was actually at hazard on the voyage. If the entire amount of the charter or hire to be paid on the vessel from New York to San Francisco, had been insured under the first charter from New York to San Francisco, the underwriter would hesitate to insure an amount additional to what was actually at risk on the voyage over that route from New York to San Francisco.

EFFINGHAM P. SUTTON, called and sworn on behalf of respondent.

Examined by Mr. CHOATE:

Q. You are a member of the firm of Sutton & Co., in this city?

A. Yes, sir.

Q. Engaged in the years 1863 and 1864 in what was called the Dispatch Line of San Francisco Packets?

A. Yes, sir.

Q. Do you remember chartering of Charles S. Pennell, by the charter Exhibit No. 32, the ship C. S. Pennell?

84 A. Yes, sir.

Q. Did the vessel sail under this charter?

A. Yes, sir.

Q. Do you remember whether or not she carried from New York to San Francisco, under this charter, a full cargo?

A. Yes, sir.

Q. How was the fact of her being chartered by you, if at all, advertised before her sailing; have you a settled habit?

A. Yes, sir; in two or three of the daily papers.

Q. And in any other modes?

A. Yes, sir; we have cards we send to our shippers.

Q. Do you remember which of the daily papers it is advertised in?

A. Yes, sir.

Q. Which were they?

A. The Journal of Commerce, The Evening Post, and Commercial Advertiser.

Q. Beginning when? She appears to have sailed in April; the discharge was made in December, 1863. What was your practice as to beginning to advertise?

A. She had forty-five days to load.

Q. Do you begin to advertise at the beginning of the loading days.

A. Yes, sir.

Q. The charter contains this clause, "It is further understood and agreed that no cargo whatever shall be received on board during the voyage, except with the consent, in writing, of the party of the second part." Did Sutton & Co. ever give such a consent for other cargo?

A. No, sir.

Cross-examined:

Q. You have been a good deal in the California trade?

85 A. Yes, sir.

Q. It takes nearly six weeks to clear?

A. It seems so in this case. If the cargo commenced going in at the commencement of the late rains; the seasons of the year varied; sometimes we could load a vessel in twenty days; sometimes it would take forty or fifty.

Q. Sometimes three months?

A. Not as long as that.

Q. I understand you that it was advertised in the papers, and that there was a card up on the ship?

A. Not on the ship.

Q. Not on the rigging?

A. There might have been a bill up in the ship; there are hand-bills up around our door.

AUGUSTUS W. WHIPPLE, called by respondent, sworn.

Examined by Mr. CHOATE:

Q. You have been for many years in the underwriting business?

A. Yes, sir.

Q. And are now?

A. It is my business.

Q. What is your present connection?

A. I am an insurance broker and procure underwriting.

Q. How long have you been in the business of marine underwriting, and in connection with what companies and in what capacity?

A. Forty-one years in New York.

Q. In connection with what companies and in what capacity?

A. The Atlantic Commercial Insurance Company of Boston.

Q. In what capacity?

A. Agent to that company.

Q. Have you ever been anything but an agent?

86 A. I have been vice-president of a company in Wall street—the Washington Insurance Company.

Q. During what period?

A. From 1860 to 1868.

Q. Then you were in some Lloyds?

A. I was manager of the Marine Lloyds.

Q. For what period?

A. From 1870 to 1873.

Q. Were you connected as vice-president with the Washington Marine Insuarance Company in the month of March, 1864?

A. I was.

Q. Did that company insure Captain Melcher upon any risk upon the C. S. Pennell at and from New York to San Francisco?

A. Yes, sir.

Q. What was it and when was it; have you a memorandum of it?

A. I have no memorandum of it here.

Q. (Reading.) "Washington Marine Insurance, $3,300 on freight; primage, $1,300; ⅛ interest in $27,800." Do you remember whether that was prior or subsequent to March, 1864?

A. It was in March; I cannot tell the exact date.

Q. What has become of all the papers of that company—the Washington Insurance Company?

A. It is not known what has become of them.

Q. Have you had frequent occasion to search for the papers of the company?

A. Often.

Q. With what result?

A. Without any result whatsoever.

Q. A claim was made on that insurance against the Washington before its failure?

A. Yes, sir.

87 Q. Did you, as vice-president, interest yourself in finding out about the loss and investigating into the merits of the claim?

A. I did.

Q. Had you any authority from The Sun Insurance Company, prior to November, 1869, to act for it in respect to its insurance on the C. S. Pennell or its charter, or to speak for it to Mr. Rand, of Portland?

A. No, sir.

Q. Did you represent to Mr. Rand that you were in any way so authorized?

A. No, sir.

Q. Were you in court when Mr. Smith was examined?

A. I was.

Q. I want to ask you, as an underwriter, whether it is material to the risk in the case of two charters existing, such as were fully described to the witness Smith, that an applicant for insurance "on charter" should disclose to the company the existence and the termini of the two charters, in your judgment as an underwriter?

(Same objection as before; same ruling and exception.)

A. I think it is essential.

Q. In what manner do you deem it material, either as affecting the amount of premium, or as determining whether the underwriter will take the risk at all or not, the application being to insure the longer charter over the route of the shorter one?

A. The material part of it consists in the rate of premium being much larger for carrying a limited charter than it would be for carrying the immediate charter from New York to San Francisco; the next materiality would consist in the question as to the seaworthiness of the vessel after the vessel had complied with the fulfilment of the first charter. ter.

Q. You mean to say whether she was a vessel fit for the round trip?

88 A. She might be in a condition to go to San Francisco, but might not then be in a condition to take freight from the Chincha Islands to Rotterdam.

Q. In your judgment would it be material in determining whether to take the risk or not?

A. The moral hazard of the risk is one of the points that affects it.

Q. What do you mean?

A. Where a vessel is insured for a specific charter, and the parties apply to insure for a subsequent charter, which is to commence when the first voyage is over, and no limit in the risk is presented to the underwriter as to whether or not it is the interest of the assured to lose his vessel in order to gain the insurance. Where the first hazard is insured there is a moral hazard connected with manipulating the insurance of the second charter, from the fact that the existence of a subsequent insurance is a temptation to surreptitiously lose her.

Q. How does that operate different from what it does in every case?

A. The point is, if the whole insurable interest of a vessel, either in freight or charter of the vessel is covered for a special voyage, then, to insure in futuro another voyage which is to take its commencement at the termination of the other voyage, is in itself a direct temptation to lose the vessel in order that they may gain the insurance, which has not begun to be earned on the second or subsequent charter.

Cross-examined:

Q. Have you the policy which the Washington company gave Captain Melcher, or a copy of it?

Q. It is in the archives of the Washington Insurance Company, and no one knows where they are.

Mr. Choate offers in evidence the agreement between The Sun Mutual Insurance Company and Conroy & O'Conor, showing an in-

89 surance of a cargo by this defendant on the vessel from New York to San Francisco, on the 16th of March, one week prior to this insurance. I offer them to show that the defendants had actual knowledge that the vessel was sailing from San Francisco; not in ballast, but carrying cargo.

Mr. CHOATE. I will state to your honor that the opinions in the Melcher case are reported in 59 Maine, page 217, and 60 Maine, page 77.

ANDREW F. HIGGINS, called on behalf of the respondent, sworn.

Examined by Mr. CHOATE:

Q. You are a marine underwriter, I believe?

A. I am.
Q. You are now the manager of the United States Lloyds?
A. I am.
Q. That is an underwriters' association?
A. Yes, sir; an association.

By the COURT:

Q. What do you call it?
A. It is an underwriters' association on the same principle as the English Lloyds, one hundred individual subscribers.
Q. Private partnership?
A. Yes, sir; not a partnership, but private underwriters.
Q. Not a corporation?
A. Not a corporation; no, sir.
Q. A private association?
A. Yes, sir.

By Mr. CHOATE:

Q. How long, and in what way, have you been connected and familiar with the business of marine insurance as carried on here?
90 A. I have been an average adjuster, and familiar with that branch of marine insurance for the last thirty years.
Q. You were of the firm of Johnson & Higgins, average adjusters, during the larger portion of that period?
A. Yes, sir.
Q. In that business experience, have you became familiar with the whole business of marine insurance?
A. I believe myself to be familiar with that.
Q. You consider yourself capable of judging what is or is not material to a risk presented?
A. I do.
Q. Suppose you have the case of two charters upon a vessel, one from port A to port B, as for instance at and from New York to San Francisco, and the other from port A to port B, and at and thence to ports beyond, from which to take cargo and carry to still further ports beyond that, as for instance from San Francisco to Callao and the Chinchas, and load with guano for Rotterdam?
A. I shall have to ask you for an explanation of your hypothetical case; there could not be two charters for the same voyage from New York to San Francisco; one charter would be——
Q. That is proved here, that there were two such.
A. It could not be a charter; it must be a mere enumeration that the vessel should proceed from one port to the other.
Q. Is it in your judgment, material to that risk, that an applicant for insurance on charter, at and from port A to port B, should disclose to the underwriter the existence and the termini of the two charters, and which it is that he proposes to insure?
(Same objection, ruling, and exception.)
A. I should think it very important.
91 Q. You think it very material?
A. Yes, sir.
Q. By important, do you mean material?
A. Material.

By the COURT:

Q. Do you mean by material, material to the risk, or material to something else?

A. I mean material to the judgment of the underwriter, as to accepting or refusing a risk.

By Mr. CHOATE:

Q. Explain in what way you deem it material, whether as affecting the rate of premium or as determining the underwriter, whether or not, to take the risk at all, or both.

(Same objection, ruling, and exception.)

A. If the insurance were applied for without such disclosure, I should understand it to be a simple insurance on the charter upon the freight money, to be earned by the delivery of cargo at San Francisco—upon the delivery of the cargo at port B, whilst with the disclosure, I would understand it to be a proposition to make an insurance which would be in the nature of a wager policy, as there would be no actual interest to be transferred to the underwriter, or from which he could, by any possibility derive salvage; as an underwriter, I deem such insurance to have an immoral tendency.

By Mr. BENEDICT:

Q. Wager policies?

A. This kind of insurance I am speaking of.

By the COURT:

Q. What do you mean by "this kind of insurance?"

A. Such an insurance as I have last mentioned.

Q. To be what?

A. To have an immoral tendency—offering a temptation to a master to lose his vessel on such a passage, and I invariably refuse them, as an underwriter.

92 By Mr. CHOATE:

Q. What do you mean by its not affording any salvage, of which the underwriter could avail?

A. If the insurance were made upon the pending charter—the first charter, and the vessel were wrecked or disabled at some point of the voyage, say near the termination, the delivery of the cargo might be effected at a small comparative expense, and a very large proportion of the freight saved to the underwriter on freight; whilst under the second insurance, that state of facts would produce an absolute total loss, without any possibility of saving it—salvage.

Q. Explain more fully what you mean by such an insurance holding out a temptation to the destruction of the vessel between A and B?

A. The master and owners would receive pay, not only for the first freight which is to be earned——

Q. Receive pay from whom?

A. From the insurance companies in case of a total loss—not only of the whole freight pending on that passage from A to B, but of the expected freight as well, and that without a very considerable additional outlay they would have to make in undertaking and performing of the further passage.

Q. In your judgment, would it be material to the risk, in an application for insurance on the second charter at and from port A to port B, that is, covering the charter between those ports, that the ship under the first charter between those ports was earning full freight between those two ports?

A. I should think that an important element.

Q. How so?

A. If the vessel were in ballast from A to B, I should consider the insurance on the round charter from A, to B, and then to further termini, a legitimate insurance.

93 By Mr. BENEDICT:

Q. Both of the insurances?

A. Not two insurances on the first passage—only one.

By Mr. CHOATE:

Q. You mean as covering an insurable interest?

A. As having an insurable interest.

Q. You would consider the applicants then, to have an insurable interest?

A. Yes, sir—no, sir; that he has a proper insurable interest in such an adventure in one case; you understand, I do not think there is an insurable interest—I don't think there could be two charters for the same identical passage; in one, there is, which I would regard it legitimate to make such an insurance.

Q. What do you mean by the word "legitimate"?

A. The difference between the interest which actually exists and can be proved, and one which does not exist and is agreed to; an underwriter and a party can make an insurance which would be legal between themselves by positive agreement, but which——

By the COURT:

Q. What do you mean by saying if the vessel were in ballast "I should consider the round charter a legitimate insurance." Do you mean an insurance which an underwriter would take, and one that you regard that the law would uphold?

A. One that I regard the law would uphold, and one that an underwriter would take; what I would understand I am justified in doing, and what I am not justified in doing.

Q. Then you would regard if the vessel were in ballast, you would consider an insurance on the round charter from A to B, to further termini——

A. An insurance which an underwriter would be justified in taking.

94 By Mr. CHOATE:

Q. Your answers thus far, describe the circumstances referred to as material to the risk, as determining the underwriter whether to take the risk or not; can you say whether the same circumstances are material as affecting the premium, if an underwriter should conclude, on knowing the facts, to take or give an insurance on what you call the round charter, for the portion of it between A and B?

A. I should deem it material in that relation.

Q. Why so?

A. Because a larger premium is always charged upon a risk, upon which there is very remote chances of salvage, or none.

Q. You mean other things being equal?

A. Yes, sir.

Cross-examination by Mr. BENEDICT:

Q. I understand you to say that if an application were made to insure a round charter, you might take it for the round charter, if the vessel was in ballast for the first part of the voyage, but if it was not in ballast, it would not be legitimate?

A. No, sir; I didn't mean to say that; I understood the proposition to be that if there were two charters, and two insurances were asked upon them, whether I would deem it material to know that the vessel was in ballast or not in ballast, with reference to the round charter, in distinction from the other, in which the vessel was only going to one terminus, and in that proposition I answered that I should deem it material to the last insurance, to know that the vessel was in ballast.

Q. As I understand it—let me state it in another way; take the case now which we have before us; an insurance from New York to San Francisco, on a full vessel; then you mean to say that it would not be legitimate to insure that vessel on a round voyage going past the first voyage. I understand you to say, that you would not
95 consider it legitimate to insure the round voyage, unless the vessel was in ballast—then you would not insure it if she was full, of course, because she was not in ballast, then.

The COURT (reading): Take the case now which we have before us, and insure from New York to San Francisco, on a full vessel. Then you mean to say it would not be legitimate to insure the round voyage unless the vessel was in ballast?

A. No, sir; I don't mean that.

Q. What do you mean by stating that you should deem it important to know that the vessel was in ballast; because in the one case I understand you to say it was legitimate, and in the other not?

A. If an application was made to insure a charter of a vessel from New York to San Francisco, with no explanation other than those words, I could not possibly understand that that insurance had any relation to a freight to be earned after the vessel had sailed from San Francisco. Now, if it was told me that the vessel was in ballast, and they wished to insure expected and contracted freight, to be earned after the vessel left San Francisco, I would take an insurance on that round voyage.

By the COURT:

Q. Commencing at New York?

A. Commencing at New York, and charge a premium for the entire passage at and from New York to San Francisco, and thence to the subsequent termini. Now, one further explanation. I would then understand, the vessel being in ballast, there would be no possibility of a double insurance upon that first passage.

Q. You mean on any freight of the first passage?

A. On the freight or charter for passage from New York to San Francisco.

By Mr. BENEDICT:

96 Q. I understand that proposition—you would, under those circumstances, if the vessel was in ballast, take that round voyage?

A. Yes, sir.

Q. Understanding that the freight was to be earned beyond San Francisco.

A. Yes, sir.

Q. But if the vessel was full you would not take it?

A. I would not take the risk of the subsequent passage from San Francisco to the subsequent termini for a premium between New York and San Francisco, nor would I deem it as pending on that passage.

Q. You say that you would take a risk for a round voyage from here to San Francisco and to further ports, the vessel being in ballast from

New York to San Francisco; would you not take the risk if the vessel were full from here to San Francisco. I don't mean whether you would take it at the same premium, but whether you would take it?

A. I would not take it as an insurance simply from New York to San Francisco under any circumstances.

L. WOOD WALTER, called on behalf of the respondents, sworn.

Examined by Mr. CHOATE:

Q. You are a marine underwriter?

A. I am.

Q. Connected with what company?

A. The Mercantile Mutual Insurance Company.

Q. President?

A. Yes, sir.

Q. How long have you been president of that company?

A. Since 1851—about 24 years.

Q. How long have you been engaged in, and familiar with the business of marine underwriting in this city?

A. About thirty years.

97 Q. Suppose you have a case of two charters upon the vessel, one from port A to port B, as for instance, at and from New York to San Francisco, and the other from port A to port B, and at and thence to ports beyond, from which to take the cargo and carry to still further ports beyond them, as for instance, from San Francisco to Callao and the Chinchas, and there to load with guana for Rotterdam, is it in your judgment, material to the risk, that the applicant for an insurance on charter at and from port A to port B, should disclose to the underwriter the existence and the termini of the two charters, and which it is that he proposes to insure?

A. I should think it was material.

Q. Then please explain in what manner you deem it material, whether as affecting the rate of premium or as to determining the underwriter to take the risk at all, or both.

A. On both considerations.

Q. Not taking the risk on both, but both material, as to the premium and as to taking it at all?

A. Yes, sir, that is what I mean.

Q. Give your reasons?

A. The risk I should consider as materially increased under ordinary circumstances, by the fact that during the first part of the voyage, as from New York to San Francisco, it would be rather the interest of the assured to lose the vessel.

Q. Will you explain more fully how it increases the risk and how it would be for his interest to lose the vessel?

A. As a general rule, I think the hazard to the underwriter is increased in proportion, as the interest of the owner.

The COURT. That is not an answer to the question; you say that the risk would be materially increased under ordinary circumstances, because it would be rather the interest of the assured under these circumstances to lose his vessel during the first part of the voyage.

98 Now, the question is, how would it be to his interest to lose the vessel—how would he make anything by losing the vessel?

A. For the reason, as I understand it, that the whole sum insured, both on the first charter and the extension would become due under the insurance by a total loss during the voyage.

Q. Would there also be a difference in respect to salvage, in case of the loss of the vessel on the first passage?

A. There might be under certain circumstances of disaster a material difference in that respect.

Q. Suppose all the facts in respect to both charters to be disclosed to the underwriter, would it be material to the risk, whether under the first charter, the vessel was to be earning freight or to sail in ballast; I mean during the two ports under the first charter—between the two first ports?

A. I should think it would be material.

Q. How so?

A. Possibly by the nature of the cargo, which would render the first part of the risk more hazardous than the latter part, and there are other considerations.

Cross-examination by Mr. BENEDICT:

Q. In the case of an insurance, at and from New York to San Francisco on a charter from New York to San Francisco, thence to Callao and the Chinchas, there to load with guano for Rotterdam, is there any special temptation to the master or to the insured, to cast away the vessel on the insured part of the route from New York to San Francisco, the vessel being then in ballast?

A. Not necessarily, I think.

Q. I put you another case: In the case of the insurance of a charter from New York to San Francisco, where the insurance is upon a real value, is there any special temptation to the insured to cast away the vessel on the route from New York to San Francisco?

99 A. I should think not.

Q. If you unite those two things, the first insurance which I mentioned, and the second insurance which I mentioned, is there any special temptation on the route from New York to San Francisco to cast away the vessel?

A. I don't understand the question.

Q. Then I will put it in another form: In a case where both those insurances exists during the voyage from New York to San Francisco, is there any special temptation in the master to cast away the vessel on the portion of the route from New York to San Francisco?

A. When the round charter is insured?

Q. That case, and the case of an insurance at the same time between New York and San Francisco, you say that in separate cases there are no special temptations. Now you unite the two; how does that make any difference, uniting the two insurances?

A. I don't understand the question. Am I to understand that both charters are insured, that to San Francisco and the round also?

Q. Yes; both insured over the same route.

(Question withdrawn.)

Q. In a case where both those insurances existed during the voyage from New York to San Francisco, is there any special temptation in the master to cast away the vessel on the portion of the route from New York to San Francisco?

A. I should think there was.

Q. From which of the two insurances does that temptation arise—the insurance on the first mentioned charter, or the insurance on the charter from New York to San Francisco?

A. It might, under circumstances, arise from the two combined, but

mainly from the round charter; am I at liberty to give a reason?

100 Q. Certainly.

A. For the reason that in case of the loss of the vessel prior to her arrival at San Francisco, the owner would claim to recover the amount of both charters, without having incurred any expense towards the accomplishment of the round charter, beyond San Francisco at least.

JOHN P. PAULISON recalled on behalf of the respondents.

Examined by Mr. CHOATE:

Q. Have you found the contract of insurance between The Sun Mutual Company and Conroy & O'Conor, mentioned by you yesterday.

A. I have.

Q. Please produce the same.

A. I have the policy in my hand, here.

Mr. CHOATE. Mr. Benedict, have you any objection now to make to my putting this in evidence? I will state it is an open policy from New York or Liverpool, from San Francisco, and under the date of March 16th, 1864. Insurance on ship C. S. Pennell, New York. Ditto (that is San Francisco), $2,632 It is on merchandize. 18th, two days afterwards, ship C. S. Pennell, New York to ditto, war risk, $2,632, on merchandize.

(Marked in evidence Exhibit No. 33.)

Q. Have you ascertained, and if so, how, whether the Journal of Commerce was taken by the respondent at the time of this insurance; was it taken in the office of The Sun Insurance Company?

A. I believe the paper was taken by the company at that time.

Q. What evidence have you found for it?

A. I have a bill made out by the Journal of Commerce.

101 Q. At what time?

A. March, 1864.

Q. You found a bill covering that year, did you?

A. Yes, sir; for the subscription of that paper.

Respondents rest.

CHARLES DENNIS, called on behalf of the libellants, sworn.

Examined by Mr. TAFT:

Q. Where do you reside?

A. I reside in Brooklyn, 164 Montague street.

Q. What is your business?

A. I am vice-president of the Atlantic Mutual Insurance Company of New York.

Q. And have been so how long?

A. Upwards of twenty years—held various degrees—second vice-president.

Q. Have been actively engaged in insurance business all this time?

A. Yes, sir.

A. Had a very large experience in the marine insurance business, haven't you?

A. I have had a large experience; the company is one of the largest in New York.

Q. In the case of an application for an insurance at and from New York to San Francisco upon a charter from New York to San Francisco, thence to Callao and the Chinchas; thence to take a load of guano to

Rotterdam, would you deem it material to the risk to know that the vessel was to go out under another charter from New York to San Francisco, with a load of coal and general merchandize, material to the risk, either as to taking the risk or the rate of premium; the cargo from New York to San Francisco to be a full capacity of the vessel?

102 A. I should deem the information as material to taking the risk; I should further deem the quantity of coal on board the vessel as material in regard to naming the rate of premium; the rate of premium on vessel loaded with coal, and on freights by such vessel, being much higher than if loaded with general cargo.

Q. Have you anything further to add to that as to the rate of premium? I will then put a new question. Suppose the cargo from New York to San Francisco in the case I have named be an ordinary cargo—the vessel not heavily loaded with coal—would it make any difference in that case, with the rate of premium on the risk as named, or with the question of taking the risk at all?

A. With a full understanding of the fact that there were two charters here, and that the vessel was well and properly loaded, it would not, in my judgment, have made any difference in the rate of premium.

By the COURT:

Q. Would not have made any difference in the rate of premium?

A. In other words, I would have insured the charter for the guano voyage, or so much of it as between New York and San Francisco, at the same rate of premium as I would have done had the vessel been in ballast.

By Mr. TAFT:

Q. In the case of such a cargo as that, then, from New York to San Francisco, would you deem its existence as material in determining whether you would take the risk spoken of on the guano charter; you have already answered as to the rate of premium, now I ask about taking the risk?

A. My answer to that would be, that in all cases where a vessel loads a considerable proportion of coal with her cargo——

103 Q. I meant to say, with such a cargo as you mentioned.

The COURT. Take the question as it is.

A. The rate of premium is higher than if only a small quantity of coal composed the cargo.

The COURT. That is not an answer to the question.

Mr. TAFT. I will withdraw that question and put another.

Q. In the case of a cargo from New York to San Francisco, consisting of general merchandize and not largely of coal, would the existence of such a cargo make any difference in determining whether you would take the risk on the guano charter that we have spoken of before?

A. It would not, sir.

Q. In case of two insurances, one at and from New York to San Francisco on a charter such as I have first named, and another on a charter from New York to San Francisco, there being in both instances real values insured, is there in your opinion any greater temptation to the insured to cast away the vessel on the route from New York to San Francisco, than there would be in the case in which there was only the insurance on the guano charter, and the vessel in ballast from New York to San Francisco?

A. With an honest man, sir, there ought not to be any more temptation in one case than the other; I hold that an honest man ought not to be tempted by any such thing; I might add to it, that such a case,

in case of loss, the suspicion that the loss was occasioned or influenced by the fact of there being two insurances on the same voyage, might arise.

Q. I will ask you this question, does the whole ground of suspicion arise from the existence of the insurance on the guano charter?

104 A. If any ground for suspicion exists, it would attach as much to one as the other.

Q. Would you regard it as any suspicion attaching in case of an insurance on a charter from New York to San Francisco alone?

A. All the parties being in good repute, I should not consider there was any ground for suspicion.

By the COURT:

Q. No ground for suspicion in what?

A. In case of loss.

Q. Suspicion of what?

A. Of wrong-doing—of fraud.

By Mr. TAFT:

Q. If the parties were in good repute, and you didn't know of any suspicious circumstances, you would not think there was any ground of suspicion?

A. No, sir; the fact that there being any insurance, is good ground of suspicion in case of loss, that the loss was wrongfully made.

Q. In your business, has it been a common thing for you to have any insurance on vessels going out from New York to San Francisco with a cargo, and afterwards to go from San Francisco to the Chinchas, and other ports, to take a cargo of guano and thence to other ports and has such employment of vessels been common?

A. I don't now recollect any single instance of ever making such an insurance.

Q. I simply ask you about the business of the vessels?

A. As that specified, you specified a voyage to San Francisco.

Q. I don't wish to confine it to cases of insurance such as I have specified, but to any insurance.

A. My answer is correct to that.

105 By the COURT:

Q. Now, the latter part of the question is, has such employment of vessels been common?

A. I don't know as I am in a position to answer the latter part of that question; I am not sufficiently familiar with the custom.

Cross-examination by Mr. CHOATE:

Q. Why do you deem it material in the case stated in the first question put to you on the direct examination, that the existence and substance of both charters should be disclosed by the applicant?

A. It would be material.

Q. I will ask you to explain your reasons to your answer to the first question on your direct examination. The question is this: Why do you deem it material in the case stated, in the first question put to you on the direct examination, that you should have the information, which in your answer to that question you stated you should deem it material to take the risk?

A. I should deem it material to know the character of the cargo, for one point; I should deem it further material to know that two insur-

ances were proposed for the same voyage, that I might weigh that fact is against the reputation of the applicant.

Q. In the case of two charters, such as described in that question, have you ever taken the risk for the round charter, over the route of the short charter, where under the short charter the vessel was earning full freight?

A. I have already stated in my direct examination that I have no recollection of ever having made such an insurance.

Q. Have you, in your experience, ever known such an insurance to be made by anybody?

(Objected to. Overruled. Exception.)

A. I have not, sir.

106 Q. In such an insurance, what salvage could there be in case of the vessel being condemned and sold in consequence of marine perils on the way over the route of the short charter?

(Objected to. Overruled. Exception.)

A. I don't understand that there could be any salvage on the guano charter, nor would there be any partial loss or general average.

Q. Why would there not be any partial loss or general average?

A. There being no freight on board applicable to that charter.

Q. How would the absence of freight on board, applicable to that charter, exempt the insured of that charter, from liability or partial loss or general average.

A. For the reason that if the vessel repaired and proceeded to San Francisco and entered upon the charter, take in her cargo, she would earn her freight.

Q. She take in cargo at San Francisco?

A. Callao or Chinchas, or any other point.

By the COURT:

Q. She would earn her freight.

A. Yes, sir.

By Mr. CHOATE:

Q. Don't every interest contribute to the general average?

A. It does.

Q. Is not then your reason, or the opinion you have expressed, that there is any interest at risk under the round charter, until the vessel reaches San Francisco?

(Objected to.)

By the COURT:

Q. In answering all these question' on both sides, haven't you understood when we have been talking about risk on the round charter, that that risk did not cover that portion of the route between New York and San Francisco?

107 A. That I have understood, under the ordinary insurance?

Q. No, under this insurance?

A. I regard that as ordinary insurance. If the insurance was qualified on board or not on board, earned or not earned, I think it would change the character of the insurance.

Q. In what sense have you answered these questions? That, in respect to the round charter there was no risk for the voyage between New York and San Francisco?

A. I have not understood there was.

By Mr. CHOATE:

Q. Would you, as an underwriter, knowingly, permit an owner of a

vessel to insure freight or charter to the full carrying capacity of the vessel, more than once at the same time between two ports?

A. No, sir, I don't think I would.

Redirect:

Q. In the case of an application for an insurance at and from New York to San Francisco, upon a charter from New York to San Francisco, thence to Callao and the Chinchas; thence to take a load of guano to Rotterdam, would you deem it material to the risk, to know that the vessel was to go out under another charter, from New York to San Francisco, with a load of coal and general merchandize material to the risk, either as to taking the risk or as to the rate of premium. The cargo from New York to San Francisco being the full capacity of the vessel; do I understand you, that you understood the question which has just now been read, to be a case in which no risk would be insured at all?

A. Under an ordinary insurance; I don't see how there could be any interest to apply.

Q. Then how would it be material in case of such a risk as
108 that, to know anything at all in regard to the question, as to whether the vessel was going out from New York to San Francisco with cargo or not, if there was no insurance?

A. If there was no insurance, it would not be material, but as I understand the first question, there was an insurance.

Q. I wished to be so understood.

A. That there was an insurance?

Q. Yes, sir. Now, suppose that insurance to be in fact or in law, upon an insurable interest, contrary to your present impressions, would that change the answers which you have given, assuming that insurance for that portion from New York to San Francisco, to be a valid insurance?

A. If I had made such an insurance.

By the COURT:

Q. What do you mean by such an insurance?

A. An insurance with the full knowledge that there were two insurances on separate charters for a part of the same voyage or for the same voyage, taken understandingly in case of loss, I should have felt myself bound to pay under such an insurance.

By Mr. TAFT:

Q. And your answers as to the materiality of the risks would remain, as you have already stated?

A. Yes, sir.

By Mr. BENEDICT:

Q. You stated on your previous examination, that you had never made an insurance such as was stated to you there, and that you had never known such an insurance to be made. Have you ever known any similar insurances to be made? If so, state what it is.

A. I have frequently made insurances where vessels have been chartered in Liverpool to New York and to Baltimore, to load cargo for other voyages, the insurance being made to cover the passage
109 from Liverpool to New York or to Baltimore, the real interest in the charter not to attach until the loading of the vessel at Baltimore or New York.

Q. What do you mean by the real interest not to attach?

A. The actual charter was made from Baltimore to other ports; Bal-

timore to Dublin or to Cork; that was the charter; now, we have insured the value of such charters from Liverpool to New York, qualifying the insurance with the words "earned or not earned," and "on board or not on board."

Q. Have you had such cases when the vessel was coming here with cargo from Liverpool to New York, which freight was insured in other offices?

A. I have made insurances; made such insurances on vessels in ballast and also other vessels with cargo on board; as to whether the freight was insured or not, I cannot answer.

Q. You didn't make it a subject of inquiry?

A. No, sir; they confined us, your honor, to "such insurances," instead of the words "similar insurances"; I don't want to be misunderstood.

Recross by Mr. CHOATE:

Q. Was that with the understanding that there were two charters covering the route from Liverpool to New York?

A. No, sir; we di dn't understand that there were two charters; we understood that the interest we insured was the value of the outward charter; that the vessel was fitted to earn the outward charter, and in case of loss between Liverpool and New York, coming this way, they would be defeated from earning that charter, and they wished to protect themselves.

Q. In any of those cases, did the vessel earn a full freight from Liverpool to New York?

110 A. In some of them they had full cargo.

Q. Can you recall any such case?

A. I cannot recall them by name of vessel; I have a recollection of one instance where the vessel had a full cargo of salt, bound for Baltimore.

Q. Who was the party? Do you remember anything about it?

A. I cannot recollect that without reference to my books at the office.

Q. How long ago was it?

A. Within a year, I should judge, as near as I can recollect.

Q. Do you remember of any other such case?

A. I remember having made several insurances of that kind; sometimes in ballast, sometimes in cargo.

Q. Where the vessel brought full cargo?

A. Where the vessel brought more or less cargo; I could not answer as to its being a full cargo.

Q. Well, in those cases you were fully informed of all the particulars, were you not?

A. Yes, sir; that is, we understood the interest that we were insuring.

Q. And the terms of your policy were very special?

A. In those cases.

Q. Was there any agreement in the policy in reference to a credit of the homeward freight in case of loss?

A. That is the freight between Liverpool or New York or Baltimore; no, sir.

Q. In those cases was the charter described as from Liverpool or from the port of the United States, the charter that you insured?

A. It was not described as the charter from Liverpool to New York; it was described only as the value of a charter from the United States to the ultimate port.

111 Q. I want to ask you once more, whether you have made yourself, or know of any other underwriter making an insurance on a charter which began at Liverpool, thence to a port in the United States, and thence with cargo to Europe, for the passage from Liverpool to the port of the United States, when you knew that the vessel was earning freight from Liverpool to the United States?

A. No, sir.

Testimony closed.

112 EXHIBIT No. 1.

No. 51564.] By The Sun Mutual Insurance Company. [Cargo.

The Ocean Insurance Company, on account of whom it may concern, loss payable to them, do make insurance and cause to be insured, lost or not lost, at and from Cuba to Boston or Portland, on property.

This company not to be liable for more than fifteen thousand dollars by any one vessel at one time, unless otherwise agreed upon at the time of endorsement.

The amount insured by this policy is expressed in the paper currency of the United States, and in case of loss to be paid in that currency at the denominational value.

It is understood and agreed that this company does not take any risk unless the Ocean Insurance Company take or have an amount on same risk equal to one-half the amount covered by this company upon all kinds of lawful goods and merchandize, laden or to be laden on board the good vessel or vessels , whereof is master for this present voyage, or whoever else shall go for master in the said vessel, or by whatever other name or names the said vessel, or the master thereof is or shall be named or called . Beginning the adventure upon the said goods and merchandizes from and immediately following the loading thereof on board of the said vessel at aforesaid, and so shall continue and endure until the said goods and merchandize shall be safely landed at aforesaid. And it shall and may be lawful for the said vessel in her voyage to proceed and sail to, touch, and stay at any ports or places if thereunto obliged by stress of weather, or other unavoidable accident, without prejudice to this insurance. The said goods and merchandize hereby insured are valued at .

It is further agreed, that the usual leakage and difference of guage of molasses from any foreign port or ports in Louisiana or Texas is eighteen per cent., and that this company is not liable for any loss thereon, unless amounting to at least twenty-five per cent.

S. W. V.-Pt.

113 Touching the adventures and perils, which the said Sun Mutual Insurance Company is contented to bear and takes upon itself in this voyage, they are of the seas, men-of-war, fires, enemies, pirates, rovers, thieves, jettisons, letters of mart and countermart, surprisals, takings at sea, arrests, restraints, and detainments of all kings, princes, or people, of what nation, condition, or quality soever, barratry of the masters and mariners, and of all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the said goods and merchandizes, or any part thereof. And in case of any loss or misfortune, it shall be lawful and necessary to and for the assured, factors, servants, and assigns to sue, labor, and travel for, in and about the defense, safeguard, and recovery of the said goods and merchandizes, or any part thereof, without prejudice to this insurance; to the charges whereof the said insurance com-

pany will contribute according to the rate and quantity of the sum herein insured, having been paid the consideration for this insurance by the assured or assigns at and after the rate of two per cent. nominal , subject to such addition or deduction as shall make the premium conform to the established rate at the time the return is made to the company. Property on deck warranted free from claims for damage by wet, exposure, breakage, or leakage. And in case of loss, such loss to be paid within thirty days after proof of loss and proof of interest in the said (the amount of the note given for the premium, if unpaid, being first deducted), but no partial loss or particular average shall in any case be paid, unless amounting to five per cent.: Provided always, and it is hereby further agreed, that if the said assured shall have made any other assurance upon the premises aforesaid, prior in date to this policy, then the said Sun Mutual Insurance Company shall be answerable only for so much as the amount of such prior assurance may be deficient towards fully covering the premises hereby assured, and the said Sun Mutual Insurance Company shall return the premium upon so much of the sum by them assured as they shall be by such prior assurance exonerated from. And in case of any insurance upon the said premises subsequent in date to this policy, the said Sun Mutual Insurance Company shall nevertheless be answerable for the full extent of the sum by them subscribed hereto, without right to claim contribution from such subsequent assurers, and shall accordingly be entitled to retain the premium by them received in the same manner as if no such subsequent assurance had been made. It is also agreed that the acts of the insured or insurers in recovering, saving, and preserving the property insured, in case of disaster, shall not be considered a waiver or acceptance of an abandonment. It is also agreed that the property be warranted by the assured free from any charge, damage, or loss which may arise in consequence of a seizure or detention, for or on account of any illicit or prohibited trade, or any trade in articles contraband of war.

114

Warranted by the assured free from all claim for or loss damage arising from any war-like or belligerent act, or from capture, seizure, restraint, or detention by any privateer, cruiser, or armed vessels whatsoever.

If laden on board a vessel of a belligerent nation, warranted free from loss or expense, arising from capture, seizure, or detention, or the consequences of any attempt thereat; or if by a neutral vessel, warranted not to abandon in case of capture, seizure, or detention, until after condemnation of the property insured, nor until ninety days after notice of said condemnation is given to the company; also, warranted not to abandon in case of blockade, and free from any expense in consequence of capture, seizure, detention, or blockade, but in the event of blockade to be at liberty to proceed to an open port, and there end the voyage; any stipulations in this policy to the contrary notwithstanding.

In case of claims for damage on dry goods or hardware exceeding fifteen per cent., the company to have the privilege of settling upon the principle of a salvage loss, paying to the assured the sum insured, with the freight and the duties.

115 In witness whereof, the president or vice-president of the said Sun Mutual Insurance Company hath hereunto subscribed his name and the sum insured, and caused the same to be attested by their secretary in New York, the sixteenth day of January, one thousand eight hundred and sixty-four.

Premium, $2,000.

$2,000. MEMORANDUM.—It is agreed, that bar, bundle, rod, hoop and sheet iron, wire of all kinds, tin plates, steel, madder, sumac, wickerware and willow, manufactured or otherwise, salt, grain of all kinds, tobacco, Indian meal, fruits (whether preserved or otherwise), cheese, dry fish, vegetables and roots, rags, hempen yarn, bags, cotton bagging and other articles used for bags or bagging, pleasure carriages, household furniture, skins and hides, musical instruments, looking-glasses and all other articles that are perishable in their own nature, are warranted by the assured free from average, unless general; hemp, tobacco stems, matting and cassia, except in boxes, free from average under twenty per cent., unless general; and sugar, flax, flax-seed and bread, are warranted by the assured free from average under seven per cent., unless general; and coffee in bags or bulk, pepper in bags or bulk, and rice free from average under ten per cent., unless general.

4th Feb., 1864. It is also agreed to cover such other risks as this company may approve and endorse hereon. S. W., V. P't.

Warranted by the assured free from damage or injury from dampness, change of flavor, or being spotted, discolored, musty or mouldy, except caused by actual contact of sea water with the articles damaged, occasioned by sea perils. In case of partial loss by sea damage to dry goods, cutlery, or other hardware, the loss shall be ascertained by a separation and sale of the portion only of the contents of the packages so damaged and not otherwise; and the same practice shall obtain as to all other merchandize as far as practicable.

This company is not liable for leakage on molasses or other liquids, unless occasioned by stranding or collision with another vessel.

116 If the voyage aforesaid shall have been begun and shall have terminated before the date of this policy, then there shall be no return of premium on account of such termination of the voyage.

In all cases of return of premium in whole or in part, one-half per cent. upon the sum insured is to be retained by the assurers.

$100,000 (one hundred thousand dollars).

U. S. Stamp, 25 cts. cancelled.

S. WHITEHEAD, *Vice-President.*

E. R. ANTHONY, *Secretary.*

1864. February 2. Additional $100,000 (one hundred thousand dollars), subject to same conditions as above.

S. WHITEHEAD, *Vice-President.*

U. S. Stamp, 25 cts. cancelled.

E. R. ANTHONY, *Secretary.*

Written on margin opposite additional subscription the following:

"Warranted by the assured free from all claim for loss or damage arising from any warlike or belligerent act, or from capture, seizure, restraint, or detention by any privateer, cruiser, or armed vessel whatsoever."

No. 51564.

Dates.	Vessels.	From—	To—		Am'ts.	Rates.	Prem's.
1864.							
January 19	Bark Hunter	Portland	Havana	Marine risk	$2,500	1½	$37 50
"	" Desiah	"	"	" "	2,500	1½	37 50
"	" "	"	"	War "	4,500	1	45 00
"	Brig G. Republic	"	Cardenas	Marine "	1,300	1¾	22 75
"	" M. Traub	"	Matanzas	" "	3,000	1½	45 00
"	" "	"	"	War "	3,000	1	30 00
"	Bark A. Lincoln	Mansanilla	B. or P.	" "	1,500	1	15 00
"	" "	"	"	Marine "	1,500	2	30 00
"	Sch. Windward	Cardenas	U. S.	" " ⅝ cargo	8,000	2	160 00
"	" "	"	"	War "	8,000	1	80 00
"	Brig Anandale	Havana, via p't of loading.	"	" " "	6,078	1	60 78
"	" "	"	"	Marine " "	6,078	1¾	106 36
" 20	Bark M. C. Fox	Portland	Cardenas	Marine " "	8,000	1¾	140 00
"	" "	"	"	War	10,000	1	100 00
" 22	" "	"	Cardenas and back	" vessel	2,200	2	44 00
"	Sch. Starlight	Cardenas	U. S	" cargo	13,000	1	130 00
"	" "	"	"	Marine, ⅝ cargo	10,000	2	200 00
"	Bark La Ciguena	Portland	Matanzas	Marine, cargo	2,000	1½	30 00
"	" Chas. Palmer	St. John, N. B.	Havana	" cargo	6,400	1¾	112 00
118 1864.							
January 22	Brig Ella Maria	Portland	Havana	Marine cargo	$3,000	1½	$45 00
"	" " "	"	Havana and a port, and U. States.	War vessel	4,000	2	80 00
"	Ship Reaper	Cardenas	Marseilles	" "	6,000	1	60 00
" 23	Brig W. H. Parks	Cardenas	Portland	Marine cargo	9,000	1¾	157 50
"	Bark La Ciguena	Portland	Matanzas and back	" freight and outfit	1,000	3	30 00
" 28	Brig Stella	"	V. Cruz and Cuba	" "	1,500	5½	82 50
"	" "	"	" "	" vessel	1,500	5½	82 50
"	" A. C. Titcomb	"	Havana	" cargo	3,500	1½	52 50
" 29	Bark S. B. Hale	"	Cardenas	" "	3,000	1¾	52 50
"	" Arlington	Benaire	Portland	War on vessel	8,000	1	80 00
"	" "	"	"	Mar., $2,200; car., $1,500, outfits	3,700	2	74 00
"	Ship P. G. Blanchard	Havre	Callao	War vessel	14,000	3	420 00
" 30	Bark Barracouta	Matanzas	Portland	Marine cargo	20,000	1¾	350 00
"	Brig Stella	Portland	V. Cruz and Cuba	Freight marine	10,000	5½	550 00
"	Bark Ellen Dyer	"	Havana	Cargo, "	1,500	1½	22 50
"	" " "	"	"	" war	1,500	1	15 00
"	Brig Fannie	"	Matanzas	" "	2,500	1	25 00
"	" "	"	"	" marine	4,000	1½	60 00
"	" P. R. Curtis	Matanzas	Portland	Property, "	10,000	1½	150 00

Dates.	Vessels.	From—	To—		Amts.	Rates.	Prems.	
119 1864.								
Febru'y 5	Brig J. Polledo	Portland	Matanzas	Property, marine	$10,000	1½	$150 00	
"	" Antilles	"	"	Cargo, "	4,000	1½	60 00	
"	" "	"	"	" war	4,000	1	40 00	
" 6	Bark Canada	"	Cardenas	" "	6,500	1	65 00	
"	" "	"	"	" marine	6,500	1½	113 75	
"	" C. B. Hamilton	Cardenas	U. S	" "	13,000	2	260 00	
"	" "	"	"	" war	13,000	1	130 00	
"	" Norton	Portland	Havana	" marine	2,000	1½	30 00	
" 10	" "	"	"	" "	2,000	1½	30 00	
"	" Colonist	St. John, N. B.	"	" "	1,500	1½	26 25	
" 12	Brig J. Polledo	Portland	Matanzas		2,000	1½	30 00	Marine.
"	" Antilles	"	"		2,000	1	20 00	War only.
" 17	" Stockton	Stockton via Key West.	N. Orleans, or port on no. side Cuba.	On vessel	4,000	1	40 00	"
" 18	Bark Ellen Stevens	Portland	Matanzas	" cargo, M	2,500	1½	37 50	Marine only.
"	" " "	"	"	" "	3,000	1	30 00	War "
" 22	" C. B. Hamilton	Cardenas	U. S	" property, on deck	1,887	1	18 87	" on deck.
"	" "	"	"	" "	1,887	7	132 09	Marine, on deck.
"	Brig G. Republic	"	"	" cargo, 1¼ on sugar	9,000	1¼	157 50	Marine, ¼% extra.
"	" "	"	"	" 2 on molasses	10,739	2	214 78	
				" "	16,000	1	160 00	War only.
120 1864								
Febru'y 22	Brig Minnie Traub	Matanzas	Portland	On cargo	$19,000	1	$190 00	War only.
"	" " "	"	"	" "	22,000	1½	330 00	Marine.
"	Bark S. B. Hale	Cardenas	"	" "	16,000	1¾	280 00	"
"	" "	"	"	" "	14,000	1	140 00	War only.
"	Brig Enterprise	"	"	" "	16,000	1	160 00	"
"	" "	"	"	" "	16,000	1¼	280 00	Marine only.
"	" S. Rowell	"	"	" "	14,000	1¾	245 00	"
"	" "	"	"	" "	14,000	1	140 00	War only.
" 27	Ship Mazeppa	Chinchas v. Callao	Port of ad. and disch. in Europe.	On vessel	6,000	5	300 00	Marine.
"	" St. Helena	Akyab	" "	"	2,000	3½	70 00	"
"	" W. Woodbury	Chinchas v. Callao	Antwerp	"	4,000	3	120 00	War only.
"	" John O. Baker	Liverpool	Caldera, Callao, and Chinchas.	"	10,000	3	300 00	"
"	" "	"	"	On freight	10,000	3	300 00	Marine.
"	Bark Deborah Pennel	"	Valparaiso, W. C., Callao & Chinchas.	" vessel	10,000	3	300 00	War only.
"	" " "	"	" "	" freight	10,000	3	300 00	Marine only.
	" Angle-Saxon	"	S Fran. or H. Kong	" vessel	10,000	3	300 00	War "

	"	" "	"	" "	" freight	10,000	3	300 00	Marine.
	" 29	Brig Mazatlan	Cardenas	U. States	" cargo	7,000	2	140 00	" ¼% extra.
121	1864.								
176	Febru'y 29	Brig Mazatlan	Cardenas	U. States	On cargo	$7,000	1	$70 00	War only.
	"	" J. W. Woodruff	"	"	" "	9,000	1	90 00	"
	"	" "	"	"	" "	9,000	2	180 00	Marine ½ % extra.
	"	Bark Arlington	Portland	Hav. or Mat	" "	2,000	1	20 00	War only.
	"	" "	"	"	" vessel	16,000	1	160 00	"
	"	" "	"	"	" cargo	6,000	1½	90 00	Marine only.
	March 2	"	"	Mt. Video, B. Ayres, Callao, & Chinchas with liberty of pt. in W. coast S. Am.	" vessel	5,000	6	300 00	War and marine.
	"	" Orsini	"	Mt. Video and B. Ayres	" freight	4,000	4	160 00	" "
	" 4	" M. C. Fox	Cardenas	Portland	" cargo	27,000	1	270 00	War only.
	"	" "	"	"	" " leakage	24,000	2	480 00	Marine only.
	"	Ship Crescent City	Chinchas v. Callao	Havre	$5,000 war, $5,000 M. on f'ght	5,000	6½	325 00	" and war.
	" 5	Brig H. S. Emery	Boston	New Orleans	On vessel, valued at $16,000	3,000	2½	67 50	" only.
	"	B'k Ellen Dyer	Portland	Havana	Cargo	2,000	1½	30 00	" "
	"	Brig Mazatlan	Cardenas	U. States	" on deck	1,500	7	105 00	
	" 7	" Y. Republic	"	"	" sugar	2,000	1¾	35 00	Marine only.
	" 8	Bark Orsini	Portland	M. V., B. Ayres, Callao, & Chinchas with liberty of pt. west coast of S. America.	On vessel, 44,000	5,000	6	300 00	War and marine.
122	1864.								
	March 8	Ship W. Woodbury	Chinchas v. Callao	Antwerp	$10,000 on ves., $5,000 on f'ght	$15,000	3	$450 00	War only.
	" 10	Sch. Lydia	Cardenas	U. States	On cargo, 10 % leakage	3,500	2	70 00	Marine.
	"	Bark Isabel	Buenos Ayres	Boston	Vessel valued $12,000	2,000	2	40 00	"
	"	" "	"	"	Hides	5,000	2	100 00	"
	"	Ship Wm. Woodbury	Chinchas v. Callao	Antwerp	Freight	6,000	4	240 00	"
	"	" "	"	"	"	1,000	3	30 00	War only.
	" 14	Brig J. H. Dillingham	Cardenas	Port of Boston	¼ % extra cargo, 10 % leakage	19,000	2	380 00	Mar. only, ¾ ex.
	"	" C. H. Kennedy	S. Morena and Matanzas.	Portland	"	15,500	1¾	271 25	" "
	"	" "	"	"	"	15,500	1	155 00	War only.
	" 15	" Nenonah	Matanzas	U. States	"	20,000	1½	300 00	Marine "
	"	" "	"	"	"	20,000	1	200 00	War "
	"	" A. C. Titcomb	Nuevitas	"	"	15,000	1¾	262 50	Marine "
	"	" "	"	"	"	16,635	1	166 35	War "
	"	" Renshaw	P't of loading, Cardenas.	"	"	18,000	2	360 00	Mar. only, ½ ex.
	"	" "	"	"	"	18,000	1	180 00	War only.
	"	" Jas. Crosley	Cardenas	"	"	9,900	2	198 00	Marine ¼ % ex.
	"	" "	"	"	"	9,900	1	99 00	War only.
	" 17	Bark Adelaide	Havana	"	On vessel	6,500	1	65 00	"
	" 18	Ship Kate Dyer	Chinchas v. Callao	Pt. ad. and disch	"	10,000	3	300 00	"
123	1864.								
	March 18	Ship Kate Dyer	Chinchas v. Callao	Pt. ad. and disch	On freight	$4,000	3	$120 00	War only.
	"	" " "	" "	" "	"	7,000	4	280 00	Marine.

Dates.	Vessels.	From—	To—		Am'ts.	Rates.	Prems.	
" 19	Bark Gertrude	Portland	Matanzas	Property	2,100	1½	31 50	"
"	" Mary Ann	St. John, N. B.	Havana	"	3,000	1¾	52 50	"
" 22	Sch. J. B. Litchfield	S. Morena, via Matanzas.	Portland	Cargo	15,000	1¼	262 50	"
"	" "	"	"	"	15,000	1	150 00	War only.
" 23	Brig D. B. Doane	Matanzas	Bath	"	3,500	1	35 00	"
"	"	"	"	"	3,500	1½	52 50	Marine.
"	" Wacamaw	Cardenas	U. States	" leakage, etc	10,839	2	216 78	"
"	" "	"	"	" "	10,839	1	108 39	War only.
"	" J. B. Doane	Havana	Bath	On deck	1,500	7	105 00	War and marine.
"	Ship Chas. S. Pennel	N. Y., S. Francisco.	Callao and Chinchas	" charter	5,000	3	150 00	Marine.
"	" "	" "	" "	" vessel	5,000	3	150 00	War only.
"	" "	New York	San Francisco	" charter	6,550	6	393 00	War and marine.
"	" "	"	"	" primage	2,650	6	159 00	" "
"	" "	"	"	" property	1,500	6	90 00	" "
" 29	Brig Wacamaw	Cardenas	U. States	Cargo on deck	1,719	8	137 52	" "
"	Bark Canada	"	"	On cargo, sugar	3,000	1½	52 50	Marine only.
"	" "	"	"	" molassas, leakage	19,700	3	591 00	" and war.
April 6	Brig Jas. Crosby	"	"	" deck	1,175	8	94 00	War and marine.
"	Sch. Ida May	"	"	" cargo, leakage 10 ex	5,500	2	110 00	Marine only.
124 1864.								
April 6	Brig Wm. H. Parks	Cardenas	U. States	On cargo, leakage 10 ex	$11,500	2	$230 00	Marine only.
"	Ship Winged Hunter	Boston	San Francisco	Property (no P. average.)	2,500	6	150 00	Marine and war.
"	Brig Harriet	Matanzas	Portland	"	3,000	1½	45 00	" only.
" 7	Ship Wallace	Wiscassetta	New Orleans	Hay	2,000	3	60 00	War and marine.
" 8	Bark S. W. Holbrook	Portland	Cienfuegos	Property	3,000	1¾	52 50	Marine only.
"	Brig J. Polledo	"	Matanzas v. Nassau, or Bermuda.	"	11,000	1¾	192 50	"
" 9	Ship W. Woodbury	Chinchas v. Callao.	Antwrep	Freight	2,500	4	100 00	"
"	" "	" "	"	"	1,500	3	45 00	War only.
" 11	Brig M. Traub	Portland	"	Cargo	4,000	1½	60 00	Marine only.
"	" "	"	Matanzas	"	3,000	1	30 00	War "
"	" Lady Mulgrave	St. John, N. B.	"	"	2,000	2¼	45 00	Marine "
"	" "	"	"	On deck	1,000	9	90 00	" "
" 13	" T. Connor	Cardenas	U. States	Cargo, 10 % ex. leak.; sug., $8,000 mol., $1,600.	29,000	2	580 00	"
"	" "	"	"	Cargo	25,000	1	250 00	War only.
"	Sch. Starlight	Matanzas	"	" 10 % ex. leakage	25,600	1¾	448 00	Marine.
"	" "	"	"	"	25,060	1	250 00	War only.
"	Bark A. Lincoln	Cardenas	"	" 10 % ex. leakage	21,000	2	420 00	Marine.
"	Brig H. E. Wheeler	"	Portland	" "	37,000	2	740 00	"
"	" Annandale	Matanzas	"	"	27,000	1¼	405 00	"

125	1864.									
April	13	Brig Annandale	Matanzas	Portland	Cargo	$27,000	1	$270 00	War.
"	16	" Proteus	"	"	" 10 % ex. leakage	38,000	1¼	665 00	Marine.
"		Bark N. H. Haven	Lagua	"	Sugar	14,000	1¼	245 00	"
"		" "	"	"	"	9,000	1	90 00	War only.
"		" E. L. Hall	Portland	Havana	Cargo	2,000	1	20 00	"
"		Brig C. H. Kennedy	S. Morena, via Matanzas.	Portland	On deck	1,800	9	162 00	War and marine.
"		" W. H Parks	Cardenas	U. States	"	1,500	7	105 00	Marine.
"	18	Ship Cumberland	Callao & Chinchas, via Callao.	Antwerp	On vessel, $40,000	6,000	4	240 00	"
"	20	Brig Geo. Burnham	Havana	Portland	Cargo, 10 % leakage	38,000	1¼	665 00	"
"		" Restless	Nuevitas	U. States	" "	22,000	2	440 00	"
"		" "	"	"	" on deck	2,000	7	140 00	
"	22	" Antilles	Matanzas	Boston	On vessel	2,500	1	25 00	War only.
"		Ship Cumberland	Callao & Chinchas, via Callao.	Antwerp	" " $40,000	7,000	3	210 00	"
"		" Quintero	Valparaiso	U. S. or Europe	" cargo	5,000	2	100 00	Marine only.
"		" Inconstant	Bombay	New York	" "	2,000	2½	50 00	"
"		Bark Kleber	New York	Singapore	" "	1,000	5½	55 00	War and marine.
"	23	Ship Cumberland	Callao & Chinchas, via Callao.	Antwerp	" freight	5,000	3	150 00	War only.
"		" "	"	"	" ship, $40,000	5,000	3	150 00	"
126	1864.									
April	23	Bark M. C. Fox	Portland	Cardenas	On cargo	$8,000	1	$80 30	War only.
"		" "	"	"	" "	6,000	1¼	105 00	Marine only.
"	26	Sch. J. B. Litchfied	S. Morena, via Matanzas.	Portland	On deck, cargo	1,371	9	123 39	War and marine.
"		" Starlight	Matanzas	U. States	"	1,068	7	74 76	" "
"	27	Bark St. Jago	Cardenas	"	Cargo, 10 % leakage	19,412	2	388 24	Marine.
"		" "	"	"	"	19,412	1	194 12	War only.
"		" "	"	"	" on deck	1,092	8	87 36	War and marine.
"	29	" M. C. Fox	Portland	Cardenas and U. S	On vessel	2,500	2	50 00	War only.
May	3	" D. C. Yeaton	Hav. to Remedios, &c.	New York	Ft	5,000	1	50 00	"
"		" "	"	"	"	5,000	1¾	87 50	Marine.
"	5	Brig Dan'l Boone	Cardenas	U. States	" cargo, 10 % leakage	13,000	2	260 00	Marine only.
"		" "	"	"	" " on deck	2,000	7	140 00	"
"		Bark C. B. Hamilton	Nuevitas	"	" 10 % leakage	20,000	3	600 00	War and marine.
"		" "	"	"	On deck	2,000	8	160 00	" "
"		Sch. Quickstep	Matanzas and H. Hole.	"	Cargo, 10 % leakage	14,000	1¾	245 00	Marine only.
"		" "	"	"	On deck	2,000	7	140 00	"
"		Ship Lizzie Moses	May 3, 1864	June 3, 1864	" vessel, $60,000	5,000	¼	12 50	
"		" Multah	Liverpool	Boston	M'd'ze	2,000	1	20 00	Free. P. average.
127	1864.									
May	5	Ship Cowper	Cadiz	Boston	Salt	$2,380	3½	$80 50	War and marine,

Dates.	Vessels.	From—	To—		Am'ts.	Rates.	Prem's.	
" 6	" Marshfield	Chinchas v. Callao	Antwerp	Freight	6,000	7	420 00	" "
"	Brig Lily	S. Morena via Cardenas.	Portland	Cargo, 10 % leakage	To new policy.	2½		Marine.
"	Ship Wallace	Wiscassett	New Orleans	Ship, valued $50,000	6,000	1	60 00	War only.
"	Bark D. C. Yeaton	Remedios	New York	" " $18,000	6,000	1½	105 00	Marine.
" 11	Brig Ortolan	Portland	Matanzas	Cargo	3,700	1½	55 50	Marine.
"	" Annie A. Grady	S. Morena via pt. of clearance.	Portland	" to new policy				"
" 13	" Thos. Conner	Portland	Cardenas	"	6,000	1¾	105 00	"
"	" "	"	"	"	2,000	1	20 00	War.
"	" H. S. Emery	Cardenas	New Orleans	Vessel, valued at 16,000	2,000	1½	35 00	Marine.
" 17	Bark Adelaide	Phil. to Hampton Roads, Norfolk and Phil.		" $28,000	8,500	1	85 00	War only.
							$30,910 29	

128 EXHIBIT No. 2.

JANUARY 29, 1864.

J. WHITEHEAD, Esq.,
Vice-President, &c., New York:

DEAR SIR: I enclose returns for registry on Cuban policy f. M^s, on bark Sarah B. Hale, $3,000 marine, cargo; on bark Arlington, $3,700 marine, cargo and outfit; on bark Arlington, $8,000 war, vessel; ship P. G. Blanchard, $14,000, Havre to Callao.

I think, if you are willing, it will be best for you to issue to us an open policy of $100,000, which will embrace all risks except those covered by our Cuba policy, say "at and from port or ports to at and from port or ports." We will continue to have entered on our coastwise policy the appropriate risks until that is filled, when we will close it and have but two policies.

Yours truly,

WM. W. WOODBURY,
President.

EXHIBIT No. 3.

[Office of The Sun Mutual Insurance Company, Insurance Buildings, No. 49 Wall street.]

NEW YORK, *January 30th*, 1864.

W. W. WOODBURY, Esq.,
President Ocean Insurance Co., Portland, Maine:

DEAR SIR: Your favor of the 29th inst. is received, with returns, under your open policy, which are in conformity thereto. The freight and cargo per Arlington, from Benaire is entered on at two per cent. Your policy requires extension. If you will send it to us we can obviate the necessity for another policy suggested by you by writing thereon, "Also to cover such risks as the company may approve and endorse thereon."

Yours, respectfully,

J. WHITEHEAD,
Vice-President.

(In pencil on margin:) Here should be Whitehead's letter to Woodbury of Feb'y 24th, 1864.—PRINTER.

129 EXHIBIT No. 4.

OFFICE OF THE OCEAN INSURANCE COMPANY,
Portland, March 23d, 1864.

J. WHITEHEAD, Esq.,
Vice-President, New York:

DEAR SIR: Your favor of 21st inst. is received, and I herewith send our note for $4,000, six months, from March 23d, for extension of policy.

I also enclose returns for registry, as follows: $5,000 on
D. B. Doane, for Matanzas to Bath, war and marine; $5,000
Pennell, to San Francisco, and war; $5,000 fr. of do.; $25
bark Radama, Chinchas, for north side Cuba, and mari
cargo, brig Wacamaw, Cardenas, war and marine.

Yours truly,

WM. W. WOODBURY,
President.

P. S.—I also enclose an additional return for insurance on charter, primage, and property per ship C. S. Pennell, to San Francisco only.

EXHIBIT No. 4 A.

The amount insured by this policy is expressed in the paper currency of the United States, and in case of loss such loss is to be paid in that currency at the denominational value.

To The Sun Mutual Insurance Company:

Enter on open policy of this company, No. 51564, $6,550 on charter, $2,650 on primage, and $1,500 on property on board ship Charles S. Pennell, at and from New York to San Francisco, including war risk.

Rate six per cent. on board.

J. W., *V. P.*

New York, March 23d, 1864.

OCEAN INS. CO.
Per G. A. W., *Sec'y.*

130 The following appears in margin:

Warranted by the assured that vessels to be loaded with grain from the ports of New York, Philadelphia, or Baltimore, for foreign ports, are to be loaded under the inspection of the surveyor of the board of underwriters, and his certificate as to their proper loading and seaworthiness obtained, or the insurance under this policy to be void.

If laden on board a vessel of a belligerent nation, warranted free from loss or expense arising from capture, seizure, or detention, or the consequences of any attempt thereat; or if by a neutral vessel, warranted not to abandon in case of capture, seizure, or detention, until after condemnation of the property insured, nor until ninety days after notice of said condemnation is given to the company. Also, warranted not to abandon in case of blockade, and free from any expense in consequence of capture, seizure, detention, or blockade; but in the event of blockade, to be at liberty to proceed to an open port, and there end the voyage, any stipulations in this policy to the contrary notwithstanding.

EXHIBIT No. 4 B.

The amount insured by this policy is expressed in the paper currency of the United States, and in case of loss such loss is to be paid in that currency at the denominational value.

To The Sun Mutual Insurance Company:

Enter on open policy of this company No. 51564, war risk only, $5,000 on ship Chas. S. Pennell, at and from New York, to, at, and from San Francisco, and Callao, to Chinchas.

Rate, three per cent. on board.

J. W., *V. P.*

New York, March 23d, 1864.

OCEAN INS. CO.,
Per G. A. W., *Sec'y.*

The following appears in the margin:

131 Warranted by the assured that vessels to be loaded with grain from the ports of New York, Philadelphia, or Baltimore for foreign ports, are to be loaded under the inspection of the surveyor of the

board of underwriters, and his certificate as to their proper loading and seaworthiness obtained, or the insurance under this policy to be void.

If laden on board a vessel of a belligerent nation, warranted free from loss or expense arising from capture, seizure, or detention, or the consequences of any attempt thereat; or if by a neutral vessel, warranted not to abandon in case of capture, seizure, or detention until after condemnation of the property insured, nor until ninety days after notice of said condemnation is given to the company. Also warranted not to abandon in case of blockade, and free from any expense in consequence of capture, seizure, detention, or blockade; but in the event of blockade to be at liberty to proceed to an open port, and there end the voyage, any stipulations in this policy to the contrary notwithstanding.

EXHIBIT No. 4 C.

The amount insured by this policy is expressed in the paper currency of the United States, and, in case of loss, such loss is to be paid in that currency at the denominational value.

To The Sun Mutual Insurance Company:

Enter on open policy of this company No. 51564, $5,000, on charter of ship Chas. S. Pennell, at and from New York, to, at, and from San Francisco, and Callao to Chinchas.

Rate, three per cent. on board.

J. W., *V. P.*

New York, March 23d, 1864.

OCEAN INS. CO.,
Per G. A. W., *Sec'y.*

The following appears in the margin:

Warranted by the assured that vessels to be loaded with grain from the ports of New York, Philadelphia, or Baltimore for foreign
132 ports, are to be loaded under the inspection of the surveyor of the board of underwriters, and his certificate as to their proper loading and seaworthiness obtained, or the insurance under this policy to be void.

If laden on board a vessel of a belligerent nation, warranted free from loss or expense arising from capture, seizure, or detention, or the consequences of any attempt thereat; or if by a neutral vessel, warranted not to abandon in case of capture, seizure, or detention until after condemnation of the property insured, nor until ninety days after notice of said condemnation is given to the company. Also warranted not to abandon in case of blockade, and free from any expense in consequence of capture, seizure, detention, or blockade; but, in the event of blockade, to be at liberty to proceed to an open port, and there end the voyage, any stipulations in this policy to the contrary notwithstanding.

EXHIBIT No. 5.

[Office of The Sun Mutual Insurance Company, Insurance Buildings, No. 49 Wall street.]

NEW YORK, *March 24th*, 1864.

W. W. WOODBURY, Esq,
President Ocean Insurance Co., Portland, Maine:

DEAR SIR: Your favor of the 23d inst. is received, and note for $4,000

and returns as stated. Those per brig D. B. Doane, bark Radama, and brig Wacamaw, and on charter, etc., per Chas. S. Pennell, $10,700, in conformity thereto.

[redacted] marine risk per Chas. S. Pennell to San Francisco, thence to [redacted]d Chinchas, our regular tariff rate is four and one-half per [redacted] war risk on same is ~~with~~ the same, but we propose to enter [redacted]narine and war on $5,000 per four per cent.

[redacted]urs, respectfully,

J. WHITEHEAD,
Vice-President.

133 EXHIBIT No. 6.

OFFICE OF THE OCEAN INSURANCE COMPANY,
Portland, March 26th, 1864.

J. WHITEHEAD, Esq.,
Vice-President, &c., New York:

DEAR SIR: Your favor of the 24th inst. is received. I think really, considering that you have the risk on charter, primage, and property to San Francisco, at full rates, you should take the war and marine to San Francisco and Chinchas on C. S. Pennell at six per cent., as there is or will be but little risk in the Pacific after leaving San Francisco. I can have both risks done at less than these rates.

I enclose return for registry of $5000 under policy No. 50736; we would like to have you remove the restriction on this policy, which prevents us from binding your company, and allow us to enter upon it any risk which this company may take, and hold to an amount double which we hold. I make this request on account of the shortness of some of our risks, say, hence to Boston or New York. We, of course, notify you at once of the amount we enter.

Yours, truly,

W. W. WOODBURY, *President.*

Please enter on the cargo risk for Mary C. Fox, the fifteen per cent. average clause, adding ¼.

EXHIBIT No. 7.

[Office of The Sun Mutual Insurance Company, Insurance Buildings, No. 49 Wall street.]

NEW YORK, *March 28th*, 1864.

W. W. WOODBURY, Esq.,
Pres. Ocean Ins Co., Portland, Maine:

DEAR SIR: Your favor of the 26th inst., is received with a return, per schooner Olive Elizabeth, which is entered in conformity thereto, as have also been the returns of the 23d inst., per ship C. S. Pennell.

134 We have amended our policy to you, No. 50376, by erasing the clause "no risk to attach, etc.," and adding, viz, "all risks to be reported to the company so soon as known. It is also agreed to cover shipments to double the amount which the Ocean Insurance Company may take and hold on the same, which you are authorized to write on the policy, and also to make the erasure above named.

Yours, respectfully,

J. WHITEHEAD,
Vice-President.

¼ per cent. additional for leakage is charged for Mary C. Fox.

EXHIBIT No. 8.

By the Ocean Insurance Company.

No. 24580.

[Int. rev. stamp. 50 cents.]

This policy of insurance witnesseth, that the president and directors of the Ocean Insurance Company, do, by these presents, cause George M. Melcher, for account of whom it concerns, loss, if any, payable to , to be insured, lost or not lost, $6,650 on charter, $2,650 on primage, and also $1,500 on property on board ship Charles S. Pennell, at and from New York to San Francisco.

If, on a passage at the end of the term, the risk to continue at pro rata premium until twenty-four hours after arrival at port of destination, and no longer, either on hull or freight, prohibited from carrying grain in bulk, from carrying passengers on more than one deck, and from being engaged in the coolie trade.

In case of loss under the continuation clause, three months' additional premium is warranted by the assured, any clause in this
135 policy to the contrary notwithstanding, whereof is master for the
Sum insured, $10,000. present voyage, or whoever else shall be master in the said vessel, or by whatsoever other name or names the said vessel or master thereof is or shall be named or called, beginning the adventure upon the said as aforesaid, and to continue during the voyage aforesaid on the vessel until she shall be arrived and moored at anchor twenty-four hours in safety, and on the property until landed.

And it shall be lawful for the said vessel, in her voyage, to proceed and sail to, touch, and stay at any ports or places, if thereunto obliged by stress of weather or other unavoidable accidents, without prejudice to this insurance.

Vessel valued at $ premium included. Touching the adventures and perils which the said insurance company are contented to bear and take upon them in this voyage, they are: Of the seas, fire, barratry of the master (unless the insured be owner of the vessel) and of mariners and all other losses and misfortunes which have or shall come to the damage of the said or any part thereof, to which insurers are liable by the rules and customs of insurers in Portland, excepting such losses and misfortunes as are referred to by clauses in the margin of this policy; provided, that the insurers shall not be able for any partial loss on hemp and flax, unless the loss amount to twenty per cent. on the whole aggregate value of *of* such articles, nor for any partial loss on saltpetre, gunny cloth, gunny bags, twine jute, and East India hemp and skins, unless the loss amount to ten per cent. on the whole aggre' value of such article, nor for any partial loss on sugar, flaxseed, bread, tobacco, and rice, unless the loss amount to seven per cent. on the whole aggregate value of such articles, nor for any partial loss on salt, grain, fish, fruit, hides,
136 skins, ice, or other goods that are esteemed perishable in their own nature, unless it amount to seven per cent. on the whole aggregate value of such articles, and happen by stranding; nor for leakage of oil, unless it be occasioned by stranding or collision with
Freight valued at $ premium included. another vessel; nor for any partial loss on other goods, or on the vessel or freight, unless it amount to five per cent. exclusive, in each case, of all charges and expenses incurred for the purpose of ascertaining and proving the loss; but the owners of such goods shall recover on a general average; it is also agreed that the

insurers shall not be liable for partial loss or damage to bar, bundle, rod, hoop, plate and sheet iron, wire of all kinds, tin plates, steel, cassia in mats, linseed in pockets, and goods stowed loose.

It is further agreed that the insurer shall not be liable for damage or injury to goods by dampness, rust, change of flavor, or by being spotted, discolored, or mouldy, unless the same be caused by actual contact of sea water with the articles damaged, occasioned by sea perils; and that the company shall not be liable for loss or damage by wet or exposure to the elements of goods insured, as on deck, nor for any other loss on the same, unless it amount to twenty per cent., and then, for the excess above fifteen per cent., only in case of damage by perils of the sea, to dry-goods, cutlery or other hardware, the loss shall be ascertained by a separation and sale of the portion only of the contents of the packages so damaged, and not otherwise; and the same practice shall obtain as to all other merchandize as far as practical; and, in case of any loss or misfortune, it shall be lawful for the insured,
137 factors, servants, and assigns, to sue, labor, and travel for in and about the defence, safeguard, and recovery of the said or any part thereof, without prejudice to this insurance, to the charges whereof the said insurance company will contribute in proportion as the sum insured is to the whole sum at risk; and so the president and directers aforesaid are contented, and do hereby bind the capital stock and other common property of the said insurance company to the insured, executors, administrators, and assigns for the true performance of the premises, confessing themselves paid the consideration due unto them for this insurance, by the insured, at and after the rate of 5½ per cent.

Property valued at $. premium included.

Prem. $588.50; policy, $1.25—$589.75.

To add for each passage, viz., one per cent. if loaded with more than registered tonnage of guano, coal, salt, nitrate of soda, iron, copper ore or slate, either or in any combination, or with more than one-fourth of registered tonnage of marble; one-half per cent., if loaded with cargo of rice or teak wood, also to add one per cent. for each time in the North Sea, between October 1st and March 1st, or the Black Sea, between May 1st and September 1st, and Bay of Fundy, between July 1st and September 15th, and between November 15th and April 1st, and river and Gulf of St. Lawrence between August 1st and October 1st.

Prohibited from the river and Gulf of St. Lawrence and the Black Sea, between October 1st and May 1st, and from Guano Islands in the Pacific Ocean (except the Chinchas), and from using Torre's Straits, also for loading more than three-fourths registered tonnage of marble, one per cent. to add for each passage to or from Mexico or Central America, and one-half per cent. to add for each passage traversing West India latitudes between July 15th and October 15th.
138 And it is hereby agreed that, if the insured shall have made any other insurance upon the aforesaid, prior in date to this policy, then the said insurance company shall be answerable only for so much as the amount of such prior insurance may be deficient toward fully covering the property at risk, whether for the whole voyage or from one port of lading or discharge to another, and the said insurance company shall return the premium, or a ratable part thereof, upon so much of the sum by them insured, or for such part of the voyage as they shall be exonerated from by such prior insurance, *accepting* half per cent., which shall be retained in all cases of returned premium; provided that no return premium shall be made for any passage whereon the risk has once commenced, and in case of any insurance upon the

said , whether it be for the whole or part of the voyage subsequent in date to this policy, the said insurance company shall nevertheless be answerable to the full extent of the sum by them herein insured, without right to claim contribution from such subsequent , and shall accordingly be entitled to retain the premium by them received in the same manner as if no such subsequent insurance had been made; and in case of loss, such loss shall be paid in sixty days after proof and adjustment thereof, the amount of the premium note without discount if unpaid, and all sums due to the company from the insured when such loss becomes due, being first deducted, and all sums becoming due being first paid or secured to the satisfaction of the said president and directors,
they discounting interest for anticipating payment on notes not
139 due. It is also agreed that, in case of capture or detention, the insured shall not have the right to abandon therefor, until proof is exhibited of condemnation or of the continuance of the detention (by capture or other arrest), for at least ninety days, and that the insured shall not abandon in consequence of the port of destination being blockaded, but the vessel shall in such case have liberty to proceed to another safe port, not blockaded, and there end the voyage, or wait a reasonable time for the blockade of the original port of destination to be raised. It is agreed that the insurers, without its being considered a waiver or acceptance of abandonment, may after a disaster take possession of and repair the property insured, and that the acts of the insured or insurers, in recovering, saving, and preserving the property insured in case of disaster, shall not be considered a waiver or acceptance of abandonment; warranted by the assured free from any loss or expense by capture, seizure, restraint, blockade, condemnation, plunder, waste, or destruction by any person or persons, or by, or consequent upon the acts of any power or assumed power, or under the authority of any State or confederacy of States, now or heretofore included within the United States, and also from any loss whatever, occurring while under detention or restraint, any stipulations in this policy to the contrary notwithstanding.

It is also agreed that the insurers shall not be answerable for any charge, damage, or loss, which may arise in consequence of seizure or detention for or account of illicet or prohibited trade, or trade in articles contraband of war, but the judgment of a foreign consular
140 or colonial court, shall not be conclusive upon the parties as to the fact of there having been articles contraband of war on board, or as to the fact of an attempt to trade in violation of the laws of nations; it is also agreed that this policy shall be void in case of its being assigned, transferred, or pledged without the previous consent in writing of the insurers.

It is also agreed that the insured shall not have the right to abandon the vessel for the amount of damage merely, unless the amount which the insurers would be liable to pay under an adjustment as of a partial loss, shall exceed half the amount insured, and in case of a total loss of the vessel, with salvage, the amount allowed out of the salvage to the officers and crew, for wages earned or services rendered previously to the loss, shall be considered as so much of the salvage applied to the use of the ship owners, even although the same should be allowed or paid under the name of salvage and not as wages, and shall accordingly be deducted in adjusting the loss. It is agreed that if any dispute shall arise relating to a loss on this policy it shall be submitted to the judgment, and determination of arbitrators mutually chosen, whose award in writing shall be conclusive and binding on all parties.

It is further agreed that the usual leakage and difference of gauge of molassas from any foreign port or port in Louisiana or Texas is eighteen per cent., and that the company is not liable for any loss thereon, unless amounting to at least twenty-five per cent. net; if there shall be any lime on board, on cargo, or on freight, fifty per cent. to be added to the premium for the passage.

141 The company is not liable for wages or provisions, excepting general average when customary at port of destination.

In witness whereof the president of the said Ocean Insurance Co., hath hereunto subscribed his name, and caused the same to be countersigned by their secretary, at their office, in Portland, this 23d day of March, one thousand eight hundred and sixty-four.

W. W. W., *President.*

G. A. W., *Secretary.*

The following appears in the margin, in red ink:

It is especially agreed, that instead of deducting one-third for new on the articles of copper or other sheathing, there shall be deducted two-and-a-half-per cent. of the cost of recoppering, after deducting the value of the old copper and nails for each and every month the copper shall have been on the vessel at the time of recoppering; and if the copper shall have been on forty months, the cost of recoppering shall be wholly borne by the assured.

This company agrees to cover the risk of loss by collision, according to the decisions of the courts of Massachusetts, prior to 1853; provided, that the company shall not in any case be liable for a greater sum than the amount insured by this policy on ship and freight.

142 EXHIBIT No. 9.

OFFICE OF THE OCEAN INSURANCE COMPANY,
Portland, June 16th, 1865.

E. R. ANTHONY, Esq.,
Vice-Pres. Sun Mutual Ins. Co., New York:

DEAR SIR: Your favor of the 14th inst. is received. We had the following amounts insured on ship C. S. Pennell: $8,000 on charter, valued at same, for C. S. Pennell, esq.

$3,000. Vessel at $65,000, for Capt. G. M. Melcher.
$6,550. Charter, without valuation, " "
$2,650. Primage, " " " "
$1,500. Property consisting of chronometer and clothing, for Capt. G. M. Melcher.

We retained $3,000 of the first-named and of charter, and $3,000 on vessel, and you reinsured the balance.

The agent of the captain reports, that Mr. Pennington, one of the owners, has settled with the Columbian his claim of $23,000. I shall be glad to hear from Messrs. Bird and Neilson about the case, as if it is all right in regard to Mr. Pennell's insurance, I should like to settle with him. He, as owner, asked in good faith, I have no doubt. The captain, I presume, is largely over-insured.

Yours, truly,

WM. W. WOODBURY,
President.

EXHIBIT No. 10.

[Office of The Sun Mutual Insurance Co., Insurance Buildings, No. 49 Wall street.]

NEW YORK, *June 17th*, 1865.

W. W. WOODBURY, Esq.,
Pres. Ocean Ins. Co., Portland:

DEAR SIR: Your favor of the 16th inst. is received, and we are obliged for the memo. of amount insured by you per ship C. S. Pennell.

We remain, yours, truly,

E. R. ANTHONY,
Vice-President.

143 EXHIBIT No. 11.

STATE OF MAINE, *Cumberland, ss:*

At the supreme judicial court, which was begun and holden at Portland, within and for the county of Cumberland, on the second Tuesday of April, being the eighth day of said month, A. D. 1873.

Present, Hon. William W. Virgin.

GEORGE M. MELCHER
vs.
THE OCEAN INSURANCE COMPANY.

George M. Melcher, of Brunswick, in the county of Cumberland, master mariner, plaintiff, versus the Ocean Insurance Company, a corporation duly established by law, and having its place of business at Portland, in said county of Cumberland, defendant.

In a plea of the case for that, on the 23rd day of March, in the year of our Lord one thousand eight hundred and sixty-four, said plaintiff was the owner of one-eighth part of the ship Charles S. Pennell, then lying in and at the port of New York, in the State of New York, and was then and there the master of said ship Charles S. Pennell, on and for the voyage hereinafter mentioned, and was then and there the owner of certain personal property on board the said Charles S. Pennell, and was then and there interested in a certain charter-party, entered into and concluded between said plaintiff, in behalf of the owners of said Charles S. Pennell, and the Government of Peru, South America, in January, to wit, the thirtieth day of January, A. D. 1864, for the conveyance of a cargo of guano in the said ship Charles S. Pennell,
144 from the Chincha Islands to the ports of Hamburg or Rotterdam, in Germany, at the rate for carriage of four pounds sterling, per ton of twenty hundred weight, British net weight, of guano, subject to a deduction for water contained in damaged guano, said charter-party being of the great value of fifty-two thousand four hundred dollars; and said plaintiff, also then and there, had an interest in the primage on said charter-party, as master of said Charles S. Pennell, amounting to the full sum of twenty-six hundred and fifty dollars, and the said plaintiff being so interested as aforesaid, on the said twenty-third of March aforesaid, caused by his agent, duly authorized for that purpose, a policy of insurance to be made by the defendants, duly executed and stamped and in consideration of the sum of five hundred and eighty-eight dollars and fifty cents premium, and one dollar and twenty-five cents for said policy, paid therefor by said plaintiff to said defendants, the said defendants made a policy of insurance in writing, duly signed, executed, and stamped upon the interest of said plaintiff, in said char-

ter-party, and upon said primage, and upon the property of the said plaintiff, on board the ship Charles S. Pennell, at and from the port of New York aforesaid, to the port of San Francisco, in the State of California; and thereby, then and there promised to insure for the plaintiff the sum of sixty-five hundred and fifty dollars upon said charter, and the sum of twenty-six hundred and fifty dollars on said primage, and the sum of fifteen hundred dollars on said personal property of said plaintiff, on board said ship Charles S. Pennell, at and from said port of New York to the port of San Francisco aforesaid, against the perils of the seas and other perils enumerated in said policy of insurance. And the plaintiff avers that ship Charles S. Pennell in good order and condition, well manned and equipped for said voyage, set sail from said port of New York on the first day of April, A. D. 1864, on the voyage described in said policy, and there afterwards on the twenty-fifth day of May, then next following, whilst proceeding on said voyage and before reaching said
145 port of San Francisco, said ship, by the perils of the seas, whilst off the coast of Brazil upon the high seas, was forced on a shoal and reef and there stranded and wrecked, and so damaged and injured that she could not proceed on said voyage, but was from necessity immediately taken to the port of Rio Janeiro, and was there condemned and from necessity sold, whereby the plaintiff wholly lost said charter-party and his interest therein, amounting to said sum of sixty-five hundred dollars, and said primage amounting to said sum of twenty-six hundred dollars, and the personal property of said plaintiff on board said ship, of the value of fifteen hundred dollars, of all which the said defendants heretofore, to wit, on the first day of July, 1864, had notice, and became bound and obliged to pay said several sums of sixty-five hundred and fifty dollars, twenty-six hundred and fifty dollars, and fifteen hundred dollars, amounting in all to the sum of ten thousand and seven hundred dollars to the plaintiff, yet, though requested, and although more than sixty days have elapsed since said notice of said loss to said defendants, they have neglected and refused to pay said ten thousand seven hundred dollars, or any part thereof, to the plaintiff.

Also, for that the said defendants, at said Portland, heretofore, to wit, on the day of the purchase of this writ, being indebted to the plaintiff in another sum of ten thousand dollars for so much money before that time had and received by the said defendants to the use of said plaintiff, in consideration thereof, then and there promised the plaintiff to pay him that sum on demand.

The above count is to recover the premium of five hundred and eighty-nine dollars and seventy-five cents paid by plaintiff to defendants, and also all losses sustained and due, and payable by the above-described policy of insurance, and said policy will be offered to support said count.

Yet the said defendants, though requested, have not paid the same, but neglect so to do, to the damage of the said plaintiff (as he says) the sum of fifteen thousand dollars.

146 And now the said defendants come and defend, etc., when, etc., and for plea say that they never promised in manner and form as the plaintiff has in his writ and declaration alleged against them, and of this they put themselves on the country.

By J. & E. M. RAND,
Their Attorneys.

And the plaintiff likewise.

A. A. STROUT.

The writ is dated September fifth, A. D. 1866. This action was entered at the October term of this court, A. D. 1866, and thence continued from term to term to the January term, A. D. 1870, when and where the plaintiff had leave of court to file a new count in the following words, viz:

Also, for that on the twenty-third day of March, in the year of our Lord one thousand eight hundred and sixty-four, said plaintiff was the owner of one-eighth of the ship Charles S. Pennell, then lying in and at the port of New York, in the State of New York, and was then and there the master of said ship Charles S. Pennell on and for the voyage hereinafter mentioned, and was then and there the owner of certain personal property on board the said ship Charles S. Pennell, and was then and there interested in a certain charter of said vessel, bearing date (New York) January 31st, A. D. 1864, for the carriage of a cargo of guano from the Chincha Islands to Hamburg or Rotterdam, calling at Cowes for orders, which was then and there of great value, to wit, of the value of sixty thousand dollars. And said plaintiff also then and there had an interest in the primage on said charter as master of said ship Charles S. Pennell, amounting to the full sum of twenty-six hundred and fifty dollars.

And the said plaintiff, being so interested as aforesaid, on the said twenty-third day of March, A. D. 1864, caused, by his agent duly authorized for that purpose, a policy of insurance to be made by the defendant corporation, duly executed and stamped, and in consideration of the sum of five hundred and eighty-eight dollars and fifty cents premium and one dollar and twenty-five cents for said policy, paid therefor by said plaintiff to said defendants, the said defend-
147 ants made a policy of insurance in writing, duly signed, executed, and stamped, upon the interest of said plaintiff in said charter and upon said primage, and upon the property of said plaintiff on board the ship Charles S. Pennell, at and from the port of New York aforesaid, to the port of San Francisco, in the State of California, and thereby then and there promised to insure the plaintiff the sum of sixty-five hundred and fifty dollars upon said charter, and the sum of twenty-six hundred and fifty dollars on said primage, and the sum of fifteen hundred dollars on said personal property of said plaintiff on board said ship Charles S. Pennell, at and from said port of New York to the port of San Francisco aforesaid, against the perils of the seas and other perils enumerated in such policy of insurance.

And the plaintiff avers that said ship Charles S. Pennell, in good order and condition, well manned and equipped for said voyage, set sail from said port of New York on the first day of April, A. D. 1864, on the voyage described in said policy, and thereafterwards on the twenty-fifth day of May then next following, while proceeding on said voyage and before reaching said port of San Francisco, said ship by the perils of the seas, whilst off the coast of Brazil, upon the high seas, was forced on a shoal or reef and there stranded and wrecked and so damaged and injured that she could not proceed on said voyage, but was from necessity immediately taken to the port of Rio Janeiro and was there condemned and from necessity sold, whereby the plaintiff wholly lost said charter and his interest therein, amounting to said sum of sixty-five hundred and fifty dollars, and said primage, amounting to said sum of twenty-six hundred and fifty dollars, and the personal property of said plaintiff on board of said ship of the value of fifteen hundred dollars, of all which the said defendant corporation heretofore, to wit, on the first day of July, A. D. 1864, had notice and became

bound and obliged to pay said several sums of sixty-five hundred and fifty dollars, twenty-six hundred and fifty dollars, and fifteen hundred dollars, amounting in all to the sum of ten thousand and seven hundred dollars to the plaintiff.

Yet, though requested, and although more than sixty days
148 have elapsed since said notice of said loss to said defendants, they have neglected and refused to pay said ten thousand seven hundred dollars, or any part thereof, to the plaintiff.

The action was thence continued to the April term. A. D. 1870, when and where it was made law on report, and continued from term to term to the October term, A. D. 1871, when the following motion of E. P. Mallet and W. H. Melcher was filed under chapter eighty-six, section sixty-eight, of Revised Statutes.

And now come E. P. Mallet and William H. Melcher and represent: Since the beginning of this action they have commenced suit against said Geo. M. Melcher, now pending in this court, wherein they summoned said Ocean Insurance Company, as trustees of said George, for the same cause which is the subject-matter of this suit.

They pray, therefore, that the court will order, that after the above-entitled cause has so far proceeded as to ascertain what, if anything, is due therein from said Ocean Insurance Company to said Melcher, the said suit shall be continued for judgment, as provided in Revised Statutes, chapter 86, section 58.

By their attorney William L. Putnam, and at the same term the decision of the law court was received in the following words, viz: "Plaintiff's evidence admissible, action to stand for trial."

The action was thence continued from term to term, to the January term, A. D. 1872, when the parties appeared and agreed to submit the cause to the determination of the justice presiding, without the intervention of a jury, with right to except, or if the justice thought best, he might after the evidence was out, report the whole case to the law court. The case was afterwards made law on report and continued to await the decision of the law court. The decision of the law court received during the October term, A. D. 1872, to wit, December 7th, A. D. 1872, was as follows, viz: Judgment for plaintiff, for nine thousand two hundred dollars and interest, from April 28, 1865.

149 The action was thence continued from term to term to the present term, and now, on the thirty-fourth day of the term, being June 28th, 1873, the defendant having been adjudged trustee in action, No. 101, on the docket of this term (Benjamin M. Melcher vs. Geo. M. Melcher and Ocean Insurance Company, trustees), and having paid as such trustee the sum of four thousand two hundred and thirty-four dollars and twenty-nine cents, it is considered and ordered by the court, with the consent of the parties, that the said plaintiff recover against the said defendant the sum of thirteen thousand seven hundred and eight dollars, less four thousand two hundred and thirty-four dollars and twenty-nine cents; that is, for nine thousand four hundred and seventy-three dollars and seventy-one cents, debt or damage and costs of suit taxed at five hundred and seventy-four dollars and seventeen cents.

Execution issued July 19th, A. D. 1873.

STATE OF MAINE, *Cumberland, ss:*

Clerk's office, supreme judicial court, Portland.

In testimony that the foregoing is a true copy of record of judgment

in George M. Melcher vs. The Ocean Insurance Company I make this certificate, and hereunto set my name and affix the official seal of the court aforesaid this twenty-eighth day of October, in the year of our Lord one thousand eight hundred and seventy-four.

[SEAL.] D. W. FESSENDEN,
Clerk of the Supreme Judicial Court in the County aforesaid.

STATE OF MAINE, *Cumberland, ss:*

I, John Appleton, chief justice of the supreme judicial court of the State of Maine, hereby certify that Daniel W. Fessenden, esq., whose signature is above affixed, is clerk of the supreme judicial court of said State for the county of Cumberland, and ex officio clerk of the superior court for said county of Cumberland, and is by law the proper person to make out and certify copies of all records and proceedings of said courts holden within and for said county of Cumberland, and that full faith and credit is and ought to be given to his acts and attestations done as aforesaid, and that his attestation is in due form of law.

In witness whereof I have hereunto set my hand and the seal of said court this twenty-eighth day of October, anno Domini one thousand eight hundred and seventy-four, and in the ninety-eighth year of the Independence of the United States of America.

[SEAL.] JOHN APPLETON.

EXHIBIT No. 12.

Ocean Insurance Co. to J. & E. M. Rand, Dr.

1866.			
Oct.	7.	To fees in suit Melcher vs. Ocean Co	$20 00
Dec.	24.	" drawing specification of defence in same	6 10
1867.			
		" fees in same January, April, and October terms	60 00
'68.			
Jan.	7.	" fees in same	20 00
April	7.	" " "	20 00
July	21.	" drawing cross-interrog's in same	12 50
Sept.	5.	" att. deposition of Neally	10 00
Oct.	7.	" fees in same	20 00
'69.			
Jan.	7.	" " "	20 00
April	7.	" " "	20 00
Oct.	14.	" drawing interrog's in same	20 00
Oct.	7.	" fees in same	30 00
		" paid for commiss. and postage same	12 90
Nov.	4.	" services at N. Y., four days, $60; expenses $56.20	116 20
Dec.	27.	" drawing interrog's in same	10 00
'70.			
Jan.	7.	" paid for commission, etc	7 90
Jan.	22.	" paid commissioner's fees on same, N. Y	15 75
		Amount carried over	$421 35

151			Amount brought forward	$421 35
	Jan.	7.	To fees in same suit	25 00
March	19.	"	att. depositions of Neill	10 00
April	7.	"	fees in same (trial)	150 00
		"	drawing report and paid stenographer	30 00
June	20.	"	att. deposition of G. N. Melcher	8 00
June	24.	"	paid for copies, Melcher case	36 50
July	7.	"	fees in same (law)	150 00
Oct.	7.	"	" "	20 00
'71.				
Jan.	7.	"	" "	20 00
April	7.	"	" "	20 00
July	7.	"	fees in same	20 00
Oct.	7.	"	" "	20 00
Nov.	29.	"	paid for copy opinion of court	3 75
'72.				
Jan.	7.	"	fees in same (trial)	100 00
April	7.	"	" "	20 00
June	3.	"	paid for copies in same	33 60
July	7.	"	fees in same (law)	150 00
Oct.	7.	"	" "	20 00
Dec.	21.	"	paid for copy opinion of court and record	6 50
				$1,264 70

CR.

1869.				
Nov.	2.	By cash of Sun Mutual Ins. Co		$100 00
'73.				
July	23.	"	to bal	1,164 70
				$1,264 70

Settled as above.

J. & E. M. RAND.

152 EXHIBIT No. 13.

PORTLAND, ME., *August* 6, 1873.

To the Sun Mutual Insurance Co., New York, N. Y.:

GENTS: This company has paid the sum of fifteen thousand four hundred eighty-five dollars and fifty-four cents, being the amount of judgment, execution, attorneys' fees recovered by Geo. M. Melcher in suit against this company, in case of ship Charles S. Pennell, and as this company was reinsured in same in your company, and the suit was conducted for the benefit and at request of your company, you are hereby requested to pay to us the above amount.

Per order of directors:

GEO. A. WRIGHT,
Secretary.

EXHIBIT No. 14.

OFFICE OF THE SUN MUTUAL INSURANCE CO.,
49 WILLIAM STREET,
New York, August 9th, 1873.

GEO. A. WRIGHT, Esq.,
Secretary Ocean Insurance Co., Portland, Me.:

DEAR SIR: I am in receipt of your letter of the 6th inst. As your company is aware, the recovery against it in the Charles S. Pennell case was upon a risk which we did not reinsure, and there is, therefore not the least propriety in making a claim upon us.

We have already had a conference with the president of your company upon the subject, and I supposed he was satisfied that justly your company had no right to demand anything from us. At all events we deny our liability, and refuse to comply with the request contained in your letter.

Yours, respectfully,

J. P. PAULISON,
President.

153 EXHIBIT No. 15.

PORTLAND, *Oct. 6th*, 1870.

DEAR SIR: We send you by to-day's mail a copy of the case of Melcher vs. Ocean Insurance Company, from which you will perceive what testimony Melcher offers in support of his claim.

The question now presented to our court is, simply whether he shall be allowed to put in the testimony. If not allowed, there is an end of his case. If allowed, then we go to trial upon other points of defense.

Very truly, your ob't servants,

J. & E. M. RAND.

J. P. PAULISON, Esq.,
President Sun Insurance Co., New York.

EXHIBIT No. 15, A.

STATE OF MAINE, *Cumberland, ss:*

Supreme judicial court, April term, 1870.

GEORGE M. MELCHER
vs.
OCEAN INSURANCE COMPANY. } No. 93.

This is an action of assumpsit on a policy of insurance, dated March 23, 1864, for $10,700 on charter, primage, and personal property on board ship Charles S. Pennell, at and from New York to San Francisco.

No. 24580.

Writ, dated September 5, 1866, and to be copied.

Declaration (to be found in Ex. 19, at fol. 645).

154 Plea, general issue and joinder. The plaintiff read in evidence the policy declared upon, issued by defendants to plaintiff, dated 23d of March, 1864; the execution of which by defendants is admitted, and which is to be copied as part of the case

EVIDENCE.

Counsel for the plaintiff put in policy of insurance in suit, marked A numbered 24580; also a note for $589.75 payable to the Ocean Insurance Co., dated March 23d, 1864, marked B.

A, B (to be found in Ex. 19, at fols. 664, 688).

Capt. George M. Melcher, the plaintiff, testified:

(Testimony to be found in Ex. 19, at fol. 689.)

Mrs. Mary E. Melcher, called by plaintiff, testified:

(Testimony to be found in Ex. 19, at fol. 759.)

Counsel for the plaintiff read the deposition of Thomas Neill, of Boston, and Horace W. Neally, of Bowdoinham.

(Depositions to be found in Ex. 19, at fols. 786, 856.)

By agreement of counsel, papers marked A and B, including parts 2, 3, 5, 6, etc., are to be referred to in the same manner as if annexed to this deposition (Neill's).

By agreement of counsel, this deposition (Neill's) so far as applicable, may be used in either or both of the two suits, entitled George M. Melcher vs. The Ocean Insurance Company, now pending in the supreme judicial court for this county.

(Counsel for the plaintiff put in the following papers subject to the objection of the counsel for the defendants, connected together and marked 5, Warrant No. 2 Report No. 3; Warrant No. 5, report No. 6; Warrant No. 8, Report No. 9; Condemnation No. 2, with the consular certificate attached.

(Papers to be found in Ex. 19, at fols. 968, 971, 979, 980, 994, 995, 1014.)

155 Plaintiff put in the deposition of Hiram B. Bangs.

(Deposition to be found in Ex. 19, at fol. 912.)

Andrew S. Sawyer, called by plaintiff, testified.

(Testimony to be found in Ex. 19, at fol. 764.)

Guano charter-party, marked C.

(To be found in Ex. 19, at fol. 935.)

E, (to be found in Ex. 19, at fol. 928).

DEFENSE.

The defendants read in evidence the written application made by Andrew S. Sawyer, agent of the plaintiff, for the insurance and policy sued for in this action, dated March 23d, 1864, a copy of which, marked P, is put into the case, and is to be copied as part of the case.

P.

I wish for Geo. M. Melcher, $6,650 on charter; and $2,650 on primage, and $1.500 on property on board ship Charles S. Pennell, at and from New York to San Francisco, including war risk.

(Signed) ANDREW S. SAWYER.

MARCH 23D, 1864.

(Copied from Ocean Insurance Co's book.)

After the foregoing evidence had been introduced, the presiding justice being of opinion that it was desirable before proceeding further in the cause to take the opinion of the full court upon the question of the admissibility of the testimony and evidence which had been put in by

plaintiff, subject to defendant's objection, the case was withdrawn from the jury, and is reported to the court for their opinion, whether any of said testimony and evidence is admissible, and, if any, what portion thereof.

And after the determination of those questions, the cause to stand for trial, if either party so desires.

C. W. WALTON,
Justice Presiding.

156 EXHIBIT No. 16.

NEW YORK, *Oct.* 15, 1870.

Messrs. J. & E. M. RAND,
Portland, Me.:

GENTS: Yours of 6th inst. was duly received; also the printed documents which you sent, and which we have perused carefully.

It is shown by the testimony that the policy was made in accordance with the application of the plaintiff, and that there was no misunderstanding in relation thereto, calling for the admission of evidence outside of the policy to explain it,—certainly none would be admissible to contradict it, for that would be setting up a new contract other than the policy itself which is sued upon.

It is important, therefore, to have excluded all evidence tending to contradict the policy. By the policy as made, the plaintiff insured on charter New York to San Francisco, $6,550; on primage, $; on personal effects, $. There is no such charter shown; but the plaintiff sets up a charter to San Francisco and ports beyond, as described in the charter-party. The insurance of the charter to San Francisco was an insurance of only a part of said charter, not amounting even to a part insurance of the charter, because as the charter-party is to the effect that no money is to be paid by the charterers unless the whole round voyage is performed, and the contract being indivisible if no money was to be paid for the passage to San Francisco, the plaintiff had no insurable interest in that part of the charter. Besides, the ship was loaded to her full capacity, and was carrying full freight on said passage outside of the charter, which was covered under special policies. The plaintiff has, therefore, by the perils insured against in the policy, suffered no loss beyond what he has already been indemnified for under his policy on freight. The interest of the plaintiff
157 in the passage to San Francisco was therefore an impossible interest. I do not mean to say that he had no interest in the charter-party, but the risk under our policy being only to San Francisco, ended before the charter-party could by any possibility be performed. I think, therefore, that the main question is the question of interest, and think that the above reasons will be found sound in law. Please let me hear from you as to your opinion of them, and, also, as to your line of defence: what your points are, in order that I may be able to form some opinion as to the ultimate issue of the suit.

Yours respectfully,
(Signed) J. P. PAULISON,
President.

EXHIBIT No. 17.

PORTLAND, *Oct.* 18, 1870.

J. P. PAULISON, Esq., *President:*

DEAR SIR: We have your favor of 15th inst., and, as requested, en-

close statement of the point now presented to the court in the Melcher suit. All other points of defence are reserved for future consideration, if necessary.

Very respectfully, your ob't servants,

J. & E. M. RAND.

EXHIBIT No. 17 A.

MELCHER
vs.
OCEAN INSURANCE CO.

The plaintiff alleges in his writ that he was interested in a charter-party "from the Chincha Islands to the ports of Hamburg or Rotterdam," and in the primage thereon, and was the owner of certain personal property, and that he insured the same "at and from the port of New York to the port of San Francisco," and that the vessel was lost on her voyage from New York to San Francisco.

158 He puts in policy insuring $6,550 on charter, $2,650 on primage, and $1,500 on property on board ship C. S. Pennell, at and from New York to San Francisco.

He then offers in evidence a charter-party for the carriage of a cargo of guano from the Chincha Islands to Hamburg or Rotterdam, and also sundry parol and written evidence.

The defendants object to the admission of the testimony and evidence offered by plaintiff, and the question is submitted to the court, whether any, and, if so, what portion of it is admissible.

We contend that the charter described in writ and offered in evidence, was not covered by this policy, and that all plaintiff's testimony, except the policy, is inadmissible.

We submit that it is very clear that the face of the policy alone (independent of any other testimony) does not cover the charter-party from Chinchas to Hamburg or Rotterdam.

Consequently plaintiff proposes to introduce parol testimony for the purpose of connecting the Chinchas charter with the policy. To show by parol that the word "charter" in the policy means the Chinchas charter.

To this we object, on the ground that there is no such latent ambiguity in policy as warrants the admission of parol testimony in explanation.

The principles of law touching ambiguities, and the admission of evidence in reference thereto, are well understood and well settled.

There is no ambiguity in the policy; it insures for a voyage "at and from New York to San Francisco"—a charter for that voyage; the words "at and from New York to San Francisco" describe the voyage and also the charter insured.

Ship had a charter from New York to San Francisco. See letter marked E., p. 38.

159 A charter from New York to San Francisco was plainly insured, and the plaintiff's testimony tends to vary and not to explain the policy.

We have no occasion, at this stage of the case, to consider any question except that of the admissibility of plaintiff's evidence, and some points alluded to in plaintiff's brief are therefore left for future answer, if required.

J. & E. M. RAND,
For Defendants.

EXHIBIT No. 18.

PORTLAND, *Jan.* 16, 1872.

J. P. PAULISON, Esq., *President:*

DEAR SIR: The court have at length decided the preliminary question of the admissibility of certain evidence in the C. S. Pennell case, and we enclose a copy of their opinion, by which you will perceive that they admit the proposed testimony.

We expect the case to come up again for trial in a week or two when the other points of defence will be presented, and we hope yet to defeat the swindling claim.

Please examine and see if you have any papers of any kind—proofs of loss, protests, etc., etc., relating in any way to this case, and, if so, please forward same to us at once.

Very truly yours,

J. & E. M. RAND.

EXHIBIT No. 18 A.

MELCHER
vs.
OCEAN INSURANCE CO.

WALTON, J.

This is an action on a marine insurance policy. The property insured is described in the policy as follows:

160 "Sixty-five hundred and fifty dollars on charter, twenty-six hundred and fifty dollars on primage, and also fifteen hundred dollars on property on board ship Charles S. Pennell, at and from New York to San Francisco."

It will be noticed that the defendants insured, among other things, a charter, meaning undoubtedly the freight, to be earned under a charter. At the time the vessel was lost she was sailing under two charters, one requiring her to carry coal and other merchandize from New York to San Francisco, and the other to carry a cargo of guano from the Chinchas Islands to Hamburg or Rotterdam. The vessel was lost on her outward voyage. The question is, whether extrinsic evidence is admissible to show which of the two charters was the one insured by these defendants. The plaintiff offers to prove that it was the guano charter, and the defendant resists upon the ground that the words "at and from New York to San Francisco," which occurs in the policy, are descriptive of the charter insured, and that extrinsic evidence to show that any other was intended is not admissible, as its effect would be to vary and not explain the policy.

We think the words "at and from New York to San Francisco" do not describe any portion of the property insured, but simply the voyage during which the risk was to continue.

It will be noticed that these words do not immediately follow the mention of the charter; that the primage and the amount insured upon it, and the other property on board the ship, and the amount insured upon it, intervene between the mention of the charter and the words which the defendants claim are a description of it. It seems to me highly improbable that words descriptive of a thing should be allowed to be thus separated from the mention of the thing described; besides, they are not, in our judgment, such words as would be likely

to be selected to describe the charter, while they are precisely
161 such as were necessary to describe the voyage. It seems to us that a charter, if described at all, would be more likely to be described by the character of the merchandize to be carried, while the voyage, during which the insurance was to run, would almost invariably be described by the mention of the ports from which and to which the vessel was to sail, nor can we believe that the words in question were used to describe both the voyage and the charter.

The property insured, and the voyage during which the risk was to run, are very different matters; and we cannot believe that any writer would employ the same words to describe both. It is difficult to conceive how he could have a description of each in his mind at the same moment; how he could intentionally pen a single sentence that should answer two such distinct purposes. We cannot believe that the words in question were written for two such distinct objects.

We have then a policy in which a charter is insured; two charters are shown to exist, either of which will answer the call on the policy. Which of these charters did the defendants insure? Upon this point the parties are at issue. How shall it be determined? Why is not this the precise case of a latent ambiguity, to remove which, extrinsic evidence may be resorted to? We think it is. Our conclusion, therefore, is, that the plaintiff's evidence was admissible for that purpose.

Storer vs. Insurance Co., 45 Maine, 175.
1 Green, Ev. §§ 287, 288, etc.
Authorities there cited.
Plaintiff's evidence admissible.
Action to stand for trial.

162 EXHIBIT No. 19.

STATE OF MAINE:

Supreme judicial court, Cumberland, ss.

GEORGE M. MELCHER *vs.* OCEAN INSURANCE COMPANY. } January term, 1872.

Assumpsit upon a policy of insurance dated March 23, 1864 (No. 24580), for $10,700 on charter, primage and personal property on board ship Charles S. Pennell, at and from New York to San Francisco.

Writ dated September 5, 1866, and to be copied; plea, general issue and joinder.

Admitted that proofs of loss were furnished February 27, 1865.

The plaintiff read in evidence the policy declared upon, issued by defendants to plaintiff, dated March 23, 1864, the execution of which is admitted, and which is to be copied; also the premium note on same for $589.75, marked B, and to be copied.

The plaintiff also read in evidence, subject to all legal objections thereto on the part of defendants, the following testimony, depositions letters, and other documents, as they were put in by plaintiff at the former trial of this case, at April term, 1870, and as they are printed in the law report thereof, viz.:

Testimony of George M. Melcher, the plaintiff, of Mary E. Melcher, and of Andrew S. Sawyer.

Depositions of Thomas Neil, of H. W. Neally, and Hiram B. Bangs.

163 Letter (marked E) from plaintiff to Andrew Sawyer, dated March 20, 1864.

Charter-party, marked "C," signatures admitted.

All the papers marked "5," etc., that are printed on pages 36 to 48, inclusive, of the former law report of this case.

All which are to be copied as printed in the law report above named, the printed report being used, by consent, as original testimony.

Plaintiff also read in evidence the depositions of Thomas Pennell and of George M. Melcher, the plaintiff, which are to be copied.

The plaintiff also put in a chart of the coast of Brazil, marked "4," also a "scrap-book" kept by plaintiff upon the voyage, marked "L" (and which was duly identified), which may be referred to.

The defendants read in evidence the written application made by Sawyer as plaintiff's agent for the insurance and policy sued for in this action, dated March 23, 1864; a copy (by consent) of which, marked "P," makes a part of the case, and to be copied.

It is admitted that the ship sailed from New York to San Francisco, loaded with a general cargo for San Francisco, with a charter from New York to San Francisco; and that plaintiff's interest under that charter was covered by other previous insurance.

All the foregoing testimony was put in, subject to legal objections.

The case was thereupon withdrawn from the jury, and is submitted to the court to enter such judgment as the law and evidence requires. If plaintiff is entitled to recover, the damages to be assessed by the court, or by a judge at nisi prius.

C. W. WALTON,
Justice Presiding.

164 *Declaration.*

In a plea of the case for that on the twenty-third day of March, in the year of our Lord one thousand eight hundred and sixty-four, said plaintiff was the owner of one-eighth part of the ship Charles S. Pennell, then lying in and at the port of New York, in the State of New York, and was then and there the master of said ship Charles S. Pennell, on and for the voyage hereinafter mentioned, and was then and there the owner of certain personal property on board the said Charles S. Pennell, and was then and there interested in a certain charter-party entered into and concluded between said plaintiff in behalf of the owners of said Charles S. Pennell and the Government of Peru, South America, in January, to wit, the thirtieth day of January, A. D. 1864, for the conveyance of a cargo of guano in the said ship Charles S. Pennell, from the Chincha Islands to the ports of Hamburg or Rotterdam, in Germany, at the rate for carriage of four pounds sterling per ton of twenty hundred weight, British net weight, of guano, subject to a deduction for water contained in damaged guano, said charter-party being of the great value of fifty-two thousand four hundred dollars; and said plaintiff then and there had an interest in the primage on said charter-party, as master of said Charles S. Pennell, amounting to the full sum of twenty-six hundred and fifty dollars; and the said plaintiff being so interested as aforesaid, on the said twenty-third day of March aforesaid, caused, by his agent duly authorized for that purpose, a policy of insurance to be made by the defendants, duly executed and stamped, and in consideration of the sum of five hundred eighty-eight dollars and fifty cents premium, and one dollar and twenty-five cents for said policy, paid therefor by said

plaintiff to said defendants, the said defendants made a policy of
of insurance in writing, duly signed, executed, and stamped,
165 upon the interest of said plaintiff in said charter-party and
upon said primage, and upon the property of the said plaintiff on board the ship Charles S. Pennell, at and from the port of New York aforesaid, to the port of San Francisco, in the State of California, and thereby then and there promised to insure for the plaintiff the sum of sixty-five hundred and fifty dollars upon said charter, and the sum of twenty-six hundred and fifty dollars on said primage, and the sum of fifteen hundred dollars on said personal property of said plaintiff on board said ship Charles S. Pennell, at and from said port of New York to the port of San Francisco aforesaid, against the perils of the seas and other perils enumerated in said policy of insurance. And the plaintiff avers that said ship Charles S. Pennell, in good order and condition, well manned and equipped for said voyage, set sail from said port of New York on the first day of April, A. D. 1864, on the voyage described in said policy, and thereafterwards, on the twenty-fifth day of May, then next following, whilst proceeding on said voyage, and before reaching said port of San Francisco, said ship, by the perils of the seas, whilst off the coast of Brazil, upon the high seas, was forced on a shoal and reef, and there stranded and wrecked, and so damaged and injured that she could not proceed on said voyage, but was from necessity immediately taken to the port of Rio Janeiro, and was there condemned, and from necessity sold, whereby the plaintiff wholly lost said charter-party and his interest therein, amounting to said sum of sixty-five hundred dollars, and said primage amounting to said sum of twenty-six hundred dollars, and the personal property of said plaintiff on board said ship of the value of fifteen hundred dollars, of all which the said defendants heretofore, to wit, on the first day of July, 1864, had notice and became bound and obliged to pay said several sums of sixty-five hundred and fifty dollars, twenty-
six hundred and fifty dollars, and fifteen hundred dollars,
166 amounting in all to the sum of ten thousand and seven hundred
dollars to the plaintiff. Yet though requested, and although more than sixty days have elapsed since said notice of said loss to said defendants, they have neglected and refused to pay said ten thousand seven hundred dollars, or any part thereof, to the plaintiff.

Also, for that the said defendants, at said Portland heretofore, to wit, on the day of the purchase of this writ, being indebted to the plaintiff in another sum of ten thousand dollars for so much money before that time had and received by the said defendants to the use of said plaintiff, in consideration thereof, then and there promised the plaintiff to pay him that sum on demand.

The above count is to recover the premium of five hundred eighty-nine dollars and seventy-five cents paid by plaintiff to defendants, and also all losses sustained and due and payable by the above-described policy of insurance, and said policy will be offered to support said count.

NEW COUNT.—Also, for that on the twenty-third day of March, in the year of our Lord one thousand eight hundred and sixty-four, said plaintiff was the owner of one-eighth of the ship Charles S. Pennell, then lying in and at the port of New York, in the State of New York, and was then and there the master of said ship Charles S. Pennell, on and for the voyage hereinafter mentioned, and was then and there the owner of certain personal property on board the said ship Charles S. Pennell, and was then and there interested in a certain charter of said

vessel, bearing date (New York) January 30, A. D. 1864, for the carriage of a cargo of guano from the Chincha Islands to Hamburg or Rotterdam, calling at Cowes for orders, which was then and there of great value, to wit, of the value of sixty thousand dollars, and
167 said plaintiff also then and there had an interest in the primage on said charter as master of said ship Charles S. Pennell, amounting to the full sum of twenty-six hundred and fifty dollars.

And the said plaintiff, being so interested as aforesaid, on the said twenty-third day of March, A. D. 1864, caused, by his agent, duly authorized for that purpose, a policy of insurance to be made by the defendant corporation, duly executed and stamped, and in consideration of the sum of five hundred and eighty-eight dollars and fifty cents premium, and one dollar and twenty-five cents for said policy paid therefor by said plaintiff to said defendants, the said defendants made a policy of insurance in writing, duly signed, executed, and stamped, upon the interest of said plaintiff in said charter, and upon said primage, and upon the property of said plaintiff on board the ship Charles S. Pennell, at and from the port of New York aforesaid, to the port of San Francisco, in the State of California, and thereby then and there promised to insure the plaintiff the sum of sixty-five hundred and fifty dollars upon said charter, and the sum of twenty-six hundred and fifty dollars on said primage, and the sum of fifteen hundred dollars on said personal property of said plaintiff on board said ship Charles S. Pennell, at and from said port of New York, to the port of San Francisco, aforesaid, against the perils of the seas and other perils enumerated in said policy of insurance.

And the plaintiff avers that said ship Charles S. Pennell, in good order and condition, well manned and equipped for said voyage, set sail from said port of New York on the first day of April, A. D. 1864, on the voyage described in said policy; and thereafterwards, on the twenty-fifth day of May then next following, whilst proceeding on said voyage, and before reaching said port of San Francisco, said ship, by the perils of the seas, whilst off the coast of Brazil, upon the high
168 seas, was forced on a shoal and reef, and there stranded and wrecked and so damaged and injured that she could not proceed on said voyage, but was, from necessity, immediately taken to the port of Rio Janeiro, and was there condemned, and, from necessity, sold, whereby the plaintiff wholly lost said charter and his interest therein, amounting to the said sum of sixty-five hundred and fifty dollars, and said primage, amounting to said sum of twenty-six hundred and fifty dollars, and the personal property of said plaintiff on board said ship, of the value of fifteen hundred dollars, of all which the said defendant corporation heretofore, to wit, on the first day of July, A. D. 1864, had notice, and became bound and obliged to pay said several sums of sixty-five hundred and fifty dollars, twenty-six hundred and fifty dollars, and fifteen hundred dollars, amounting in all to the sum of ten thousand and seven hundred dollars to the plaintiff.

Yet though requested, and although more than sixty days have elapsed since said notice of said loss to said defendants, they have neglected and refused to pay said ten thousand seven hundred dollars, or any part thereof, to the plaintiff; to the damage of the said plaintiff, as he says, the sum of fifteen thousand dollars.

Plea, general issue, and joinder.

Policy by the Ocean Insurance Company.

No. 24380. This policy of insurance witnesseth that the president and directors of the Ocean Insurance Company do, by these presents, cause Geo. M. Melcher, for account of whom it concerns, loss, if any, payable to to be insured, lost or not lost, sixty-five hundred fifty dollars on charter, twenty-six hundred fifty dollars on primage, and also fifteen hundred dollars on property on board ship Chas. S. Pennell, at and from New York to San Francisco.

If on a passage at the end of the term, the risk to continue at pro rata premium until twenty-four hours after arrival at port of destination and no longer, either on hull or freight. Prohibited from carrying grain in bulk, from carrying passengers on more than one deck, and from being engaged in the coolie trade.

U. S. I. R. stamp 25 cents.

In case of loss under the continuation clause, three months' additional premium is warranted by the assured, any clause in this policy to the contrary notwithstanding, whereof is master for the present voyage, or whoever else shall be master in the said vessel, or by whatsoever other name or names the said vessel, or master thereof, is or shall be named or called; beginning the adventure upon the said as aforesaid, and to continue during the voyage aforesaid on the vessel, until she shall be arrived and moored at anchor twenty-four hours in safety, and on the property until landed.

And it shall be lawful for the said vessel, in her voyage to proceed and sail to, touch and stay at, any ports or places, if thereunto obliged by stress of weather, or other unavoidable accidents, without prejudice to this insurance.

Touching the adventures and perils which the said insurance company are contented to bear and take upon them in this voyage, they are, of the seas, fire, barratry of the master (unless the insured be owner of the vessel), and of mariners, and all other losses and misfortunes which have or shall come to the damage of the said or any part thereof, to which insurers are liable by the rules and customs of insurance in Portland, excepting such losses and misfortunes as are referred to by clauses in the margin of this policy; provided, that the insurers shall not be liable for any partial loss on hemp and flax, unless the loss amount to twenty per cent. on the whole aggregate value of such articles; nor for any partial loss on saltpetre, gunny cloth, gunny bags, twine, jute, and East India hemp, and skins, unless the loss amount to ten per cent. on the whole aggregate value of such articles; nor for any partial loss on sugar, flaxseed, bread, tobacco, and rice, unless the loss amount to seven per cent. on the whole aggregate value of such articles; nor for any partial loss on salt, grain, fish, fruit, hides, skins, ice or other goods that are esteemed perishable in their own nature, unless it amount to seven per cent. on the whole aggregate value of such articles, and happen by stranding; nor for leakage of

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oil, unless it be occasioned by stranding or collision with another vessel; nor for any partial loss on other goods, or on the vessel or freight unless it amount to five per cent. exclusive, in each case, of all charges and expenses incurred for the purpose of ascertaining and proving the loss; but the owners of such goods shall recover on a general average. It is also agreed that the insurers shall not be liable for partial loss or damage to bar, bundle, rod, hoop, plate, and sheet iron, wire of all kinds, tin plates, steel, cassia in mats, linseed in pockets, and goods stowed loose. It is further agreed that the insurer shall not be liable for damage or injury to goods by dampness, rust, change of flavor, or by being spotted, discolored, or moldy, unless the same be caused by actual contact of sea water with the articles damaged, occasioned by sea perils. And that the company shall not be liable for loss or damage by wet or exposure to the elements of goods insured as on deck; nor for any other loss on the same unless it amount to twenty per cent. and then for the excess above fifteen per cent. only. In case of damage by perils of the sea, to dry-goods, cutlery or other hardware, the loss shall be ascertained by a separation and sale of the portion only of the contents of the packages so damaged and not otherwise, and the same practice shall obtain as to all other merchandize as far as practicable. And in case of any loss or misfortune, it shall be lawful for the insured, factors, servants, and assigns, to sue, labor, and travel for, in and about the defence, safeguard, and recovery of the said or any part whereof, without prejudice to this insurance; to the charges thereof, the said insurance company will contribute, in proportion as the sum insured is to the whole sum at risk. And so the president and directors aforesaid are contented, and do hereby bind the capital stock and other common property of the said insurance company, to the insured, executors, administrators, and assigns, for the true performance of the premises, confessing themselves paid the consideration due unto them for this insurance, by the insured, at and after the rate of five and one-half per cent.

Sum insured, $10,700.

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Vessels valued at $. Prem'm included.

Freight valued at $. Prem'm included.

Property val'd at $. Prem'm included.

To add for each passage, viz., one per cent. if loaded with more than registered tonnage of guano, coal, salt, nitrate of soda, iron, copper ore or slate either or in any combination; or with more than one-fourth of the registered tonnage of marble; one-half per cent. if loaded with cargo of rice or teak wood. Also to add one per cent. for each time in the North Sea between Oct. 1, and March 1; or the Black Sea between May 1, and Sept. 1; and Bay of Fundy between July 1, and Sept. 15, and between Nov. 15, and April 1; and river and Gulf of St. Lawrence between August 1 and October 1.

Premium $588.50
Policy $1.25
$589.75

Prohibited from the river and Gulf of St. Law-
172 rence and Black Sea between October 1 and May 1.

Also, from loading more than three-fourths registed tonnage of marble. One per cent. to add for each passage to or from Mexico or Central America. And one-half per

cent. to add for each passage traversing West India latitudes between July 15th and Oct. 15th.

And it is hereby agreed, that if the insured shall have made any other insurance upon the aforesaid, prior in date to this policy, then the said insurance co. shall be answerable only for so much as the amount of such prior insurance may be deficient toward fully covering the property in risk, whether for the whole voyage, or from one port of lading or discharge to another; and the said insurance company shall return the premium, or a ratable part thereof, upon so much of the sum by them insured, or for such part of the voyage as they shall be exonerated from by such prior insurance; excepting half per cent. which shall be retained in all cases of returned premium, provided that no return premium shall be made for any passage whereon the risk has once commenced. And in cases of any insurance upon the said whether it be for the whole or part of the voyage, subsequent in date to this policy, the said insurance company shall, nevertheless, be answerable to the full extent of the sum by them herein insured without right to claim contribution from such subsequent insurers; and shall accordingly be entitled to retain the premium by them received, in the same manner as if no such subsequent insurance had been made. And in case of loss, such loss shall be paid in sixty days after proof and adjustment thereof, the amount of the premium note without discount, if unpaid, and all sums due to the company from the insured, when such loss becomes due, being first deducted, and all sums becoming due, being first paid or secured to the satisfaction of the said president and directors, they discounting interest for anticipating payment on notes not due. It is also agreed, that in case of capture or
173 detention, the insured shall not have the right to abandon therefor, until proof is exhibited of condemnation, or of the continuance of the detention (by capture or other arrest) for at least ninety days; and that the insured shall not abandon in consequence of the port of destination being blockaded, but the vessel shall in such case, have liberty to proceed to another safe port not blockaded, and there end the voyage, or wait a reasonable time for the blockade of the original port of destination to be raised. It is agreed that the insurers, without its being considered a waiver or acceptance of abandonment, may after a disaster, take possession of, and repair the property insured; and that the acts of the insured, or insurers, in recovering, saving, and preserving the property insured, in case of disaster, shall not be considered a waiver or acceptance of abandonment. Warranted by the assured free from any loss or expense by capture, seizure, restraint, blockade, condemnation, plunder, waste, or destruction by any person or persons, or by or consequent upon the acts of any power or assumed power, or under the authority of any State or confederacy of States, now or heretofore included within the United States; and also from any loss whatever, occur'ing while under detention or restraint, any stipulations in this policy to the contrary notwithstanding.

It is also agreed, that the insurers shall not be answerable for any charge, damage, or loss which may arise in consequence of seizure or detention for or on account of illicit or prohibited trade, or trade in articles contraband of war; but the judgment of a foreign, consular, or colonial court, shall not be conclusive upon the parties, as to the fact of there having been articles contraband of war on board, or as to the fact of an attempt to trade in violation of the laws of nations. It is also agreed, that this policy shall be void in case of its being assigned, transferred, or pledged, without the previous consent in writing of the insurers.

It is especially agreed that instead of deducting one-third for new on the article of copper or other sheathing, there shall be deducted two-and-a-half per cent. of the cost of recoppering after deducting the value of the old copper and nails, for each and every month the copper shall have been on the vessel at the time of recoppering; and if the copper shall have been on forty months, the cost of recoppering shall be wholly borne by the assured.

174 It is also agreed, that the insured shall not have the right to abandon the vessel for the amount of damage merely unless the amount which the insurers would be liable to pay under an adjustment, as of a partial loss, shall exceed half the amount insured; and in case of a total loss of the vessel, with salvage, the amount allowed out of the salvage, to the officers and crew, for wages earned or services rendered previously to the loss, shall be considered as so much of the salvage applied to the use of the ship-owners, even although the same should be allowed or paid under the name of salvage, and not as wages, and shall accordingly be deducted in adjusting the loss. It is agreed that if any dispute shall arise relating to a loss on this policy, it shall be submitted to the judgment and determination of arbitrators mutually chosen, whose award in writing shall be conclusive and binding on all parties. It is further agreed, that the usual leakage and difference of gauge of molasses from any foreign port, or port in Louisiana or Texas, is eighteen per cent., and that the company is not liable for any loss thereon unless amounting to at least twenty-five per cent. net. If there shall be any lime on board, on cargo or on freight, fifty per cent. to be added to the premium for the passage. The company is not liable for wages or provisions, except in general average, when customary at port of destination.

This company agrees to cover the risk of loss by collision, according to the decisions of the courts of Massachusetts prior to 1853; provided that the company shall not in any case be liable for a greater sum than the amount insured by this policy on ship and freight.

In witness whereof, the president of the said Ocean Insurance Company hath hereunto subscribed his name, and caused the same to be countersigned by their secretary, at their office in Portland, this twenty-third day of March, one thousand eight hundred and sixty-four.

(Signed) WM. W. WOODBURY, *President.*
GEO. A. WRIGHT, *Secretary.*

175 *Premium note.*

Policy No. 24580.

$589.75.] PORTLAND, *March* 23, 1864.

For value received, I promise to pay the Ocean Insurance Company, or order, in eight months, with interest after, the sum of five hundred eighty-nine dollars, seventy-five cents.

ANDREW S. SAWYER.

[U. S. I. R. stamp., 30 cents. Ship C. S. Pennell.]

Capt. GEORGE M. MELCHER, the plaintiff, testified:

I reside in Brunswick, Maine. I was master of the ship Charles S. Pennell. I have been master mariner since December, 1847. I was frequently present during the building of the ship Charles S. Pennell. I was one of the original owners of the vessel. My name is mentioned in the builder's certificate. I owned one-eighth part. I sailed in her until she was sold in Rio Janeiro, with the exception of nine months Robert Given had her.

(Counsel for defendants admit that the Charles S. Pennell, was in a seaworthy condition when she sailed from the port of New York.)

We sailed from Portland for New York on the 14th of January, 1864, and arrived in New York on the third day afterwards. We commenced loading freight for San Francisco, or went into berth the 19th of February. She was coppered in New York, and she was in thorough repair in every part. She was loaded with five hundred tons of coal, and the rest was general cargo. The price of carriage of her freight was $26,500. We had also a charter to the Chinchas at the rate of £4 sterling to the ton. We started to go to San Francisco, and then by Call*oa* to the Chinchas, and then to Hamburg or Rotterdam. My vessel would carry
1,750 tons of guano. The value of a pound sterling just before
176 I left New York was $8. I think the last sterling exchange I sold was 1.88.

I had twenty-two men all told, including myself, first, second, and third mates, cook, steward, and 16 men. That was more than we usually carried, but there were four boys among them. I had my wife and niece on board. The cost of the outfit for my vessel at New York for the voyage was $11,000, and we put in about $1,000 or $1,500 here before we started. We had two suits of sails. We were going on a long voyage, and I believe it is customary and necessary to have two suits of sails. My wife and niece were wholly furnished for the round voyage. My wife had a piano and sewing-machine aboard. I made every provision for a fifteen months' voyage. My niece, Miss Fanny Scholfield, was an invalid. When I was in New York I directed Andrew Sawyer to put an insurance on my vessel. The signature to the paper shown me (marked 3) is my signature. There was nothing happened to the vessel before I crossed the equator. I crossed the 7th of May. I took the route usually taken by navigators as near as the wind will allow us to go that way. I crossed the equator 29° 52′ west. We went about twenty-six or twenty-eight miles from the island of Fernando De Morina, to the eastward. We had a very nice breeze until we got down along there, and then we got it squally and rain, from south to east-southeast. I bought my charts of Lowell & Senter, Exchange street, Portland. I had the same kind of a chart as this one shown me of the coast of Brazil. I sold my charts to the English bark Night that forwarded a part of my cargo; the charts were all new. After you get 8° south of the equator you get the southeast variables. The prevailing direction of the wind is about southeast. After striking these winds our general course down the coast was sou'-sou'-west half west on the port tack to make all
the latitude we could. On the starboard tack we made about
177 an east-northeast course. Ordinarily, when a vessel is close hauled, she will lay within about six points of the wind; that was the case with the Charles S. Pennell. I have laid down my course on the chart marked "4" each day after crossing this degree of latitude. The red line represents my course after crossing the 8° of latitude down to the time of the accident; each day I cast my reckoning; we usually took our sights in the afternoon. The day before the acci-

dent we took no sight, and the day of the accident we took two, one in the forenoon and one in the afternoon. After we took our sights we immediately cast up our latitude and longitude. The original figures I have preserved in a scrap-book. Sometimes at sea they are cast upon a slate and then rubbed out, but I had a blank book and put it in in pencil. In laying down my course upon the chart, these points represent my position when the observations were taken; between these points we tacked off and on a great many times, as the wind headed me. We were very seldom over two hours on a tack; sometimes it would reach along twelve or fourteen hours. I made the calculations myself. I think I followed the usual route pursued by navigators in going from New York to San Francisco around Cape Horn up to the time I went on to the shoal. I pursued the best route I was able, taking into consideration the winds. We first saw land about twenty-four hours before the accident; it was Mt. Pascoal; we could see it quite plain; it looked like a horn. The coast I could not see. (Witness makes a pencil-mark on the chart at the point where he first made land.) I then went off shore until midnight, or about that time, and then we would stand on again. During the remainder of the night the wind was baffling, from sou'-sou'west to sou'-sou'-east, and we were going about constantly.

On the morning of the 25th of May it was very clear and I got sight, and we were 16° 49′ south lat. At noon I was in 17° 4′ south.
178 At three o'clock and six minutes I was 17° 18′ south longitude, 38° 42′ west. When I took the sight I think she was heading sou'-sou'west or little higher. I told the mate to call them up and we would go about. It was then about twenty minutes to four—I know it was not four o'clock. I stepped into the cabin for something, and as I stepped over the sill I felt the rumbling of the ship, and she was aground. They were putting the staysails down, and I put the wheel about, and she came far enough up, so we swung the main yard. She went off until she went south of west, and there she fetched up. Shortly afterwards the wind died away. At the time she struck it was about a six knot breeze. At sundown it was perfectly calm. She struck very heavy—threshed in her rigging a good deal. The shoal we were on was on the starboard side mostly. Her shoalest part was right abaft the fore-chains. I then got out two of the boats and sounded all round in shore and off shore. On the port side there was plenty of water all along. In shore there was plenty, except what we set on. At the stern there was sixteen or eighteen fathoms. After we sounded we got a kedge-anchor along amidships, ready to run out. At that time it got to be pretty near dark. She sat down quiet until about nine o'clock, and did not move at all. I concluded it was no use to try and pull her off, and we went to work on the pumps. She did not leak a great deal at that time. I called the boats alongside, and hoisted them on board again. We continued at the pumps all night, and at five o'clock in the morning we got the kedge out. About seven she begun to move. I hauled the four braces in sharp aback, and secured the main yard. She started and swung around in shore. As she swung she struck very heavy by the mizzen channels. That was the heaviest clip she got, with the exception of two or three clips the night before. That came very near knocking the mast out of her. These South Atlantic swells come along three or four at a time, and then for
179 fifteen or twenty minutes it would be smooth and none at all. She rose up and come down on the shoal several times so you

could hardly stand on deck. It jerked the masts a great deal, and threshed in the rigging a great deal. She would not have stood more than two or three more of them. There was a good deal of crushing while she lay there, and I could see her double and twist a good deal. Her bow was going up and down considerable, enough to open the scarfs I should say two inches, and the bilge pumps worked up and down. Her mainmast went up and down. She hung on the ledge on her starboard bilge and keel. In the morning we found from a half to three-quarters of an inch of sticky mud or clay on deck that we had pumped up through the pumps. She listed to the starboard a little. When she went off she commenced leaking, I presume that was after the mud washed out of her seams. I think my wife and niece packed up their things to leave the vessel. I did not see them. I had the boats hoisted aboard, because I had heard of sailors running away with the boats at such times, and I wanted the boat for all of us. The vessel laid on the reef about sixteen hours. When she went off my course was about north-northeast; for a couple of hours or more we had quite a breeze. After laying my course for San Francisco, the second day after we got a little breeze, and she commenced leaking badly, and kept us half of the time at the pumps. As the mud washed out of her seams she leaked more. I put into Rio because the ship was not safe to go any further in. We arrived in Rio on the 5th of June, about nine o'clock. After the custom-house officer came aboard I went ashore about twelve o'clock, and the first place I went to was to the American consul, and entered the ship and called a survey. I believe that is the only course for a master to take when his vessel has been injured.

James Monroe was the American consul. The first survey was
180 held on the 7th. the next forenoon or about noon. Capt. Horace Neally, Capt. Neil, and a Mr. Ledgerwood, agent for the New York board of underwriters, and G. H. Church came off to my vessel to examine her. There was an examination made. After they got through I took the vessel up to the island. There we rigged stagings and got ready to discharge. We had to discharge, because nearly all the injury she received was under water out of sight. We took out about all of the cargo between decks before any further examination was made. I requested a further survey of the American consul. Horace Neally, Captain Neal, and Ledgerwood, and Phillips, carpenter of the Wachusetts, examined my vessel. They examined between deck and as much as she was raised out of water by the discharge of her cargo. These gentlemen came in an official capacity. My vessel was leaking at that time, if anything, a little more than formerly. They sounded the pumps on the 21st of June, I think. After we got the general cargo out we hauled around to the north end to get the coal out. We used to pump her out in the morning before we commenced work, and then we had to keep constantly pumping or work in the water. The laborers in discharging coal stood in the water a portion of the time. After the coal was out she was put into the government dry dock to examine her bottom. I put her into the dry dock under the suggestion of some persons. We were detained four days from going into the dry dock by a Russian man-of-war steamer. I made application for a survey while she was in the dock. Mr. Ledgerwood, Capt. Neally, Hiram B. Bangs, of the ship Mary Bangs, Mr. Levelle, superintendent of the government docks, examined the vessel while in the dock. That examination was to see what condition her bottom was in. I saw her after the water was pumped out of the dock, and I saw the water running out of her about forty feet abaft of the stem. It was

running out of the garboard seam and a break in the main keel.
181 By the garboard seam, I mean the seam next to the keel. The water that was running out was what run in the night before. While in the dock we calked this place, and calked the stem up a piece. The stem was slewed around a good deal to the starboard. We calked her up and took her out. The dock fees were so expensive we could not repair her there. I don't think we would be allowed to repair her there; they used the dock exclusively for men-of-war or government vessels. We did not have any difficulty in obtaining permission to put her in for the purpose of examination.

I made an examination of the vessel inside and out myself. There was about forty feet of the keel gone, and forward the main keel was ground clear up to the garboard streak, all gone. The cut-water had apparently got a blow and pushed or shoved up. The stem was slewed around to starboard so you could poke your fingers right into the seam; it had been around further than that, but had got partly back. The plank on the starboard side, from the main hatch nearly to the fore-part of the fore channels, was chafed nearly through in many places, and the copper was entirely gone. Above that the copper had been burst off the edges of whole sheets as though the ship had spread. The copper was wrinkled all over. The keel aft looked as though it had been up into the vessel and out again; I should say the keel had been twisted over and then back again. The ship was crooked up a great deal on the starboard side. Her bow had dropped right down eighteen or twenty inches. When she went into dock she touched fore and aft, but did not amidships, and she straightened out. We marked the lines when she was outside, to see how much she straightened when put in. The scarfs in the rail were all started more or less, but after we got her into the dock she straightened and closed up some of them.

The waterway seams were open a great deal. The oakum had
182 not started much in the deck, but in the covering boards and waterways it had, on the starboard side more particularly. The new treenails that were put in had started, some out and some in. We drove about five thousand new treenails when we repaired her. We tried them, and they would move whichever way we hit them, very easy. That showed that there had been a great deal of twisting on the treenails. I should consider a treenail that had been twisted a good deal and started had lost its whole power. Inside we had diagonal braces, and the ends of these on the starboard side showed a very heavy pressure. In the new waterway the scarfs had started considerable. The ends of the diagonal braces had gauged. Going down below in the hold, the new middle binding or clamp, the new work we had put in, had started off on the starboard side in some places half an inch. The lodging knees on the starboard side were all started, and nearly all on the port side. The hanging knees had gauged about from one-eighth to one-quarter of an inch more on the starboard than on the port; that showed the crushing up of the bottom of the ship. The ends of the beams that run across the ship had gauged, as far as we could see, on the starboard side. I saw the side of the ship had started off. It looked as though the ship must have spread. It was started off from the ends of the beams, some of the new work, about half an inch, along on the starboard side from the main to the fore rigging. The pointers forward are to strengthen the bow of the vessel, and are square timbers put on the inside and bolted through and through. They had moved a good deal, as the ship dropped down the ends of them had started two inches. They had worked up and down, and chafed on the

ceilings. The breast-hooks are put in to make the bow strong; they run fore and aft, and are bolted through and through. These bolts were started off and drawn into the breast hooks. Some of the
183 treenails were started out and some in. The through and through treenails were started both ways. When she was repaired we put in new rock maple "sister keelsons," fifteen inches square, the whole length, and bolted them through and through the old keelsons, so it made it stronger. The scarf of this keelson showed it had been bent a good deal, and showed the crushing up of the bottom of the ship. The backbone of the ship is the main keel, and the keelsons and riders assist that. Where the butts of the ceiling planks come together they had chafed one another. The copper was wrinkled and puffed out the worst, just about the bilge, on the starboard side, between the fore and mainmast. There was where she hung between the fore and main rigging, on the starboard side. She went into the dry dock on the night of the 22d; we did not see her until the 23d. She came out on Monday, the 25th. I caused advertisements to be inserted in the papers for seventy or seventy-five thousand milreis to repair the vessel. The advertisements shown me are the ones. There were estimates made by persons, Mr. MacMannin for one, of the cost of repairs.

After she came out of the dry dock we took her about half a mile to the island and anchored her there. We were not able to obtain any money; we kept the advertisements in three days. After we took her out, we advertised her for sale three days in the Journal of Commerce, both English and Portuguese. She was sold at public auction by an auctioneer, a Mr. Pinton. It was an open, public sale; probably there were two hundred aboard of her; the decks were full of men.

There was no place at Rio where the vessel could have been repaired, beside the government dock; the railway was not finished. The materials for repairing vessels is most all imported; I believe there is some hard wood there. The pitch, tar, and oakum is imported. I believe there were ship-carpenters enough there; the most I saw were in a Mr. McLaughlin's employ.

184 I have had but very little experience in repairing ships. I made diligent inquiry at Rio to ascertain the cost of repairing my vessel. The first ship I was connected with was the Charles S. Pennell. I used to see her frequently while she was building, and I was connected with the building of the bark Ukraine. The heaviest repairs I have been connected with was on the Pennell, and I was connected with the repairs on the Gilbert. I made inquiries in Rio, as to what it would cost to repair this vessel, of Mr. Levelle, and McLaughlin, a ship-carpenter. I did not make any inquiries about the cost of material. The gentlemen who examined my vessel made a report of a survey upon the vessel. Those surveys and warrants were placed on file in the American consul's office, at Rio de Janeiro. I think I am acquainted with the signature of the consul, James Munroe. That is his signature to the paper marked "5," and papers connected therewith. That is his signature attached to the certificate annexed to the protest. That is the consul's seal of that office on these papers. The original of these papers (marked 5) were placed on file in the consul's office. I got those certified copies at the consul's office in Rio Janeiro. I consulted with Mr. Legerwood and Mr. Levelle as to the course to be pursued by me in relation to the ship, and in relation to the injuries. Those were the only two I had any conversation with to amount to anything.

The vessel brought at the sale ten thousand milreis. The value of a milrei at that time, in gold, in Rio de Janeiro, was about fifty-eight cents, or fifty-eight to sixty cents. The cargo of the Charles S. Pennell I forwarded to San Francisco by the ship Sir John Franklin, and the English bark Knight.

We arrived home in New York on the 6th of December, 1864. I then went to see the officers of the Ocean Insurance Company. I pre-
185 sented to them the papers marked "5," in this case, and I carried the vouchers with me. These are the ones marked "7."

Q. Were the proofs of loss examined by the officers, and were they considered sufficient?

A. They made no objection. I think I presented those at the office about the middle of January, 1865.

Cross-examined:

From noon of the 23d, down to the time I run on to the reef, I was tacking back and forth; the red lines on the chart do not show the tacks, only the general course. I have heard that vessels have been through the Abrolhos Channel, but I should say it was dangerous. I was thirty-eight or forty miles north of the Abrolhos shoals. We had to tack down the coast with a long leg and a short one.

Q. How did it happen you were in so near the coast in the neighborhood of the Abrolhos shoals; was it the winds, or was it, in your opinion, the proper way to work down the coast?

A. Yes, to get down the coast.

Q. In the exercise of your judgment you took your ship in here?

A. Yes, sir. When the vessel struck I was on top of the house, or just stepping over the sill of the door. It was about twenty minutes to four o'clock, and clear weather, bright daylight. When I was getting the sight at three o'clock and six minutes, they sung out "Land." The vessel struck about twenty minutes after I first discovered land from aloft. And then I could not see the coast, only the top of Mt. Pascoal. I considered that a safe place for my vessel to be running down the coast; there was no danger put on chart along here. some of the crew were at work up aloft. We do not have lookouts in fine weather. I told the mate, when he went aloft, to keep a lookout and let me know when first he saw the mountain. When he sung out "Land, ho!" she was heading south by west, and then she headed
186 off southwest by west. The staysails were hauled down. When she fetched up she headed south by west. There was no indication, nor no notice that there was any reef or shoal there before we got on to it. The shoalest part we found was two and three-quarter fathoms, and that was right close to the ship, on the starboard side. My ship drew twenty-one feet, or about that. She was loaded to twenty feet three inches on even keel. We sounded all around there on all sides. We found the water from two to five, seven, and ten fathoms. One-half of the length of the ship off we found five fathoms. I should say the upper part of the shoal was not bigger than one-third of this room. The distance from where we went on the reef to Rio Janeiro, according to the course we took, is about six hundred miles. We were about ten days from this shoal to Rio. We got into the harbor of Rio at nine o'clock in the evening. We pumped her out that night; it took us about three hours. We had four pumps with the bilge pump. We commenced to pump her out as soon as we got the sails furled. We did not furl the sails until we come to anchor. (Witness points out the position of the dry dock on the chart.) After I took her out of the

dry dock, I took her around there (pointing on the chart), where she lay until the 11th of August. After I got into Rio, we lived on board the ship until about the 12th or 13th of July; we arrived there on the 5th of June. Twelve of the crew remained on board of the ship until she was sold; four of them ran away. Out of the twelve, I let young Myers go with Captain Bangs. He was no great affair; he had not been to sea much, and he was small. I don't know that he is first mate of the steamship South America, on the Panama line. While I was in Rio, I wrote the owners when I first arrived there, of the accident. I have not got a copy of the letter. She lay in the harbor in perfect safety until the sale. We did not take her masts down nor house her
187 spars. The auction took place on the deck of the ship. Part of the people were on deck and part below. The yards and masts were all standing. After we got off from the reef and started for Rio we had light baffling weather, about the same that we had for three days previous to getting on to the reef. Hett, Wilson & Co. bought the vessel. We left Rio to return the twelfth of October. They had then got the vessel on to the railway; they put her on about ten days after the sale; Wilson & Co. put her on, or caused her to be put on. Nothing but her yards were taken off from her, and everything out of her. She remained there till the 8th or 9th of October. She broke the railway all down and fell over her beam ends, and they had to take her masts out of her to get her up. They got her about half way up and she broke the railway down, and they let her lay there, all broken down, until the 8th of October. She was the first vessel that was put on to the railway. At the time I sailed from New York, on the first of April, 1864, I had $5,000 insurance on my part in The Sun Mutual, of New York, and $3,000 in the Ocean Ins. Co., and both charter-parties insured. At that time I owned one-eighth part, and continued to own it up to the time of the sale. The premium note given to the Ocean Insurance Company has not been paid. I effected that insurance through Captain Sawyer; I was not here to sign the premium note. I think my policy in The Sun Mutual was a yearly policy; I am quite certain it was in force at the time of the loss; it was probably taken out in the fall of the year.

I run nearer the coast on this particular day than I had previously done, because the southeast variables crowded me in; whenever I would go off the coast a little ways, it would head me off. About the time we struck, the wind was southeast by south. I came in here because the correct course around the Horn is to make all the lati-
188 tude you can. I was never on the route from New York to Rio and around the Horn before. I did not have a policy on the freight in the Columbian Insurance Company. I think it quite likely I was in New York in September, 1865. I did not cancel any policy on freight in the Columbian Insurance Company. I was told there was one there. I did not authorize any one to cancel it. I do not know of any policy being there; we had nothing to show for it. I had no return premium paid to me by the Columbian Insurance Company in 1865.

The amount of insurance on my personal property on board was $1,500, and $2,650 on primage; $6,550 on the charter; $3,300 on the freight from New York to San Francisco; making the whole amount of insurance, together with the $8,000 on my interest in the vessel, $22,000.

I wrote to the owners from Rio; I did not get any answer. I wrote the 7th of June, and the sale was on the 11th of August. I think there was sufficient time between the 7th of June and the 11th of August

for a letter to go to the owners from Rio, and for me to get an answer. The means of communication was by steam to Lisbon or Portugal, and then to England and then to this country. I did not receive any letters from the owners up to the time I left Rio Janeiro. I did not communicate with any of the insurers of the vessel directly. From the 13th of August up to the 8th of October, I was loading the two vessels and getting them ready for sea, to forward my cargo. I should say, while the Charles S. Pennell was laying in the harbor of Rio she made four feet of water a day, in twenty-four hours. There was no diminution in her leaking until after she went into the dock.

Direct resumed:

When she went into the dock, I stopped up the worst places, so she would not require so much pumping, simply to keep her afloat.

189 I was forty miles north of the Abrolhos light-house, when I went on to the reef. The light-house is in the middle of the island, and the island is in the mouth of the Abrolhos channel. Where I went on to that reef there was no danger laid down on the chart. I saw no white water before I went on, nor while I lay there. I was about twenty miles from the shore when I struck. I had no suspicion I was in the neighborhood of any danger when I went on to that shoal. I had no other reason for being there than that it was the usual course around Cape Horn, and I wanted to make all the latitude I could. I believe that to be the usual course of navigation. The vessel brought about $5,080, in gold. That was all used up in paying expenses, custom-house and dock charges at Rio. It was all used up in paying the necessary expenses arising to the vessel. (Witness is shown a paper.) That is the account current of disbursements in the harbor of Rio Janeiro; and those are the original vouchers showing where they went.

The vessel was in the dry dock about three days, and we had to pay 3,700 milreis. for it—over $1,900—in gold; beside that there was a charge for government officer's fees.

Cross resumed:

I hired the Sir John Franklin, and the English bark Night, to carry my cargo.

Direct examination resumed:

Q. While lying in New York, on the 30th of January, 1864, as master of the ship Charles S. Pennell, did you effect a charter-party?

A. I did.

(Witness is shown a paper marked C.)

Q. Examine that guano charter party-marked C, and state whether or not it is your signature.

A. That is the original charter I effected. That is my signature.

190 Q. Where was it executed?

A. In J. O. Baker's office, 134 Pearl street, New York City.

(The signatures of A. J. Schon and J. D. Mutzenbecker, to the charter-party are admitted by the counsel for defendants.)

Q. Where is S. G. Glidden who witnessed this?

A. He is dead.

(Charter-party marked C, offered and objected to by counsel for defendants. Admitted by the court subject to objection.)

Q. What was the value of that charter-party on the 23d of March, 1864?

A. £7,000 sterling; in currency, $8 to the pound.

Q. You were interested one-eighth in that charter-party?

A. I was.

Q. Did you sail from the port of New York in the ship Charles S. Pennell, and when?

A. I did, the first of April, 1864.

Q. Upon what voyage did you sail the first of April, 1864?

A. From New York to San Francisco, from there to Callao and Chincha Islands, back to Callao, and thence to Rotterdam or Hamburg, the final port of discharge.

Q. Was this charter-party marked C, effected while you were master of the ship Charles S. Pennell"?

A. The guano charter-party I effected myself, in connection with that vessel.

Q. When you sailed, on the first of April, 1864, from New York, state whether or not you then entered upon the execution of the agreement contained in this charter-party?

(Objected to by defendant. Admitted subject to objection.)

A. I did.

191 Q. State whether or not the voyage you entered upon was broken up before its completion.

A. It was.

Q. What was the value of your primage; what per cent.?

A. Five per cent. on the $56,000, or £7,000.

Q. What was the value of your primage at the time of effecting your insurance?

A. The same as the charter-party, $8 to the pound, or $2,650.

Q. Did you have your chronometers on board the vessel?

A. Both of them; one cost $225, and the other $240. I had my clothing and slop-chest. The slop-chest cost $700. I had a piano worth $150, and sewing-machine was worth $40. We did not lose any of the personal property that was insured.

Q. After the loss of your vessel, when did you come back to Portland?

A. I arrived in New York on the sixth of December, I think.

Q. Examine the paper, marked 5, passed you, and the surveys, papers, and documents connected therewith, and state whether or not you gave those to your agent, and whether or not they were given by him to The Ocean Insurance Company as part of your proof of loss.

(Objected to by defendant, and admitted subject to objection.)

A. I gave my papers to Mr. Sawyer, and these documents marked 5 I have in my hand and vouchers.

Q. Are you acquainted with the handwriting of James Munroe, consul at Rio Janeiro?

A. I am.

Q. State whether or not that is his signature to the certificate of the paper you hold in your hand (marked 5).

A. I am quite certain of it.

192 Q. Examine and see if that is the seal of the consul at Rio Janeiro?

A. That is the same seal he usually puts on papers.

Q. Did you authorize Mr. Sawyer to obtain insurance upon this charter-party?

A. I did.

Q. Examine that paper, marked E, and state whether or not that is your handwriting.

A. That is my handwriting.

Cross-examined:

Q. How did you fix the value of that charter-party at £7,000 sterling?

A. The ship always carried 1,750 tons freight at dead water.

Q. Suppose there had not been 1,750 tons put on board?

A. We should probably have brought more than that.

Q. In fixing the value of that charter, do you not base it solely upon the carrying capacity of the ship?

A. Yes, sir.

Q. Your primage was to be five per cent. on the amount of the charter money?

A. Yes, sir.

Q. When you sailed from New York to San Francisco, did you not have on board a cargo for San Francisco?

A. I did, sir.

Q. Was any of that cargo bound beyond San Francisco?

A. Not with us; our ship was not to carry it any further.

Q. Did you have a full cargo from New York to San Francisco?

A. We did.

Mrs. MARY E. MELCHER, called by plaintiff, testified:

193 I am the wife of Geo. M. Melcher. I was on board the ship Charles S. Pennell on her voyage from New York to San Francisco. A niece of my husband, Miss Fanny Scholfield, was with me. I prepared myself for eighteen months' voyage, considering I should not get home to the United States in less time than that. I took a full wardrobe to go around Cape Horn. I recollect the time the vessel went ashore off the cost of Brazil. Miss Scholfield and I were sitting on the main deck, on the port side, in front of the cabin on the grating, just a short time before she struck; the first mate was standing on deck and he looked over the side and said it seemed as though we always went faster when we had a head wind; we got up and looked over the side to see how fast she was going, and there was no white water in sight there. I had not sat down, after looking over the side, before I heard a curious and strange sound to hear at sea. I said to the first officer, "What is that?" Before he had time to answer me we were on the rock. Captain Melcher was just stepping over the sill of the door, coming out, as we brought up on the rock. The vessel lay there about sixteen hours. She lay there all night. She thumped very heavily, and seemed to go up and down. I did not look at the stern, but the bow seemed to go up and down, as we hung on the rock. I was very much excited and frightened also. The watch that was below was called up, and Miss Scholfield and I went into the cabin so as not to be in way. No one retired on board the vessel that night. We got ready to leave the vessel as soon as we found she was aground. I packed up my things; I thought we might be obliged to leave her. From the deck of the vessel I could see a faint outline of what I called the top of a mountain. The coast was not in sight from deck. I saw no island while she lay there.

ANDREW S. SAWYER, called by plaintiff, testified:

Reside in Cape Elizabeth.

194 Q. State whether you were the agent of Captain Melcher in effecting this policy of insurance March 23d, 1864, in this case.

A. I was.

Q. Did you give the premium note marked B, shown you?

A. That is my signature.

Q. For whom did you give that note?

A. For Capt. George M. Melcher.

Q. State whether the note was paid at its maturity, Nov. 24th, 1864.

A. It was, to The Ocean Insurance Co., to Captain Woodbury or Mr. Wright; they were both present at the time; they were officers of the company. If my memory serves me right, I received a bank notice?

Q. Was Mr. Woodbury the president and Mr. Wright the secretary of The Ocean Ins. Co.?

A. Yes.

Q. Out of whose funds was this note paid?

A. Capt. Melcher's; he had his funds on deposit to pay his bills with; it was paid for him.

Q. Examine the policy, marked A in suit, and state whether or not, that is the policy, you obtained from The Ocean Insurance Company, 23d of March, 1864.

A. It is.

Q. Did you have written instructions in relation to obtaining that policy?

A. I did; I received a letter from Captain Melcher that day or the day before.

Q. Examine the paper shown you, marked E, and state whether that is the letter of instruction you received.

A. It is.

Q. State whether or not you exhibited that letter to the president of the company at the time you applied for insurance.

A. I did.

195 Q. At whose request did you exhibit it to him?

A. At his own; he asked me to hand him the letter.

Q. Did he take it and examine it?

A. He took it, and I suppose examined it; he made some comments on it.

Q. What time in the day did you receive the letter?

A. I think it came in the noon train. I got it about 2 o'clock in the afternoon, and I went to The Ocean Ins. Co. the next morning at ten o'clock.

Q. State all that was said and done between yourself and the officers of this company at the time in relation to this policy of insurance, and this subject-matter insured.

(Defendant objects to both form and substance. Admitted subject to objection.)

A. After effecting an insurance on the ship, Mr. Woodbury asked me if I could give him any other insurance. I told him I had received a letter from Capt. Melcher requesting me to insure a guano charter. He said, "Let me see the letter." I passed it over the desk to him; he took it in his hands and says, "1,750 tons; aint that a large amount to insure on that ship?" I told him I had insured the ship in his office when she had carried 1,800 tons in her. He said, "Homeward charter insure out;" "why didn't the captain ask you to insure all the way round, as he had the ship?" My answer was, before the ship got through, if the war closed, he could effect the insurance cheaper. I was to be advised by Capt. Melcher on his arrival at San Francisco, and agreed with him to insure in his office if he took it. He made some other comments; among others he said, "What did Foye take the New York insurance for?" I told him six per cent. with the scrip earnings back. After some little talk he told me he would take this at five and

a half, and I was going to leave the office; he said, "It will be necessary to make application, or sign one." Wright copied an application on to his book, and I signed it without reading it; I don't know what I signed; it was mere form, I supposed.

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Q. Did he make any other comment in relation to the statement in the letter you showed him, or figures?

A. He asked me what the captain rated the pound at; I told him I thought about eight dollars. He took a pen and figured over on the desk and said he thought it was about that himself.

Q. Did he read any part of the letter about pounds when he made those figures?

(Objected to by defendant; admitted subject to objection.)

A. He did.

Q. Do you hold in your hand the letter you carried to Mr. Woodbury; and is it marked E?

A. I do; it is marked E.

Q. State what part he read when he asked you how the captain figured the pound.

(Objected to; admitted subject to objection.)

A. I cannot tell you what part he read; he said, "Say 1,750 tons, at £7,000;" then he asked me what the captain cast this insurance for at the pound. I cannot state all that was said; six years have passed; I am giving the subject-matter as well as I can.

Q. Had he just been examining the letter when he made that statement?

A. He had; I think he held the letter in his hands, or on the desk when he made the figures.

Q. What charter did you tell Woodbury you wanted insured at this time?

A. A guano charter.

Q. What description did you give him of the charter?

A. I told him the captain was chartered for guano. He says, I know it; Pennell has been in talking with me about it this afternoon.

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Q. Did you state what voyage the guano charter was for?

A. I don't know that I did, for we had stated the voyage a few minutes before in effecting the insurance on the ship. I had effected an insurance on the same route a few minutes before; the same voyage for which this guano charter was for.

Q. Did you apply for any insurance to The Ocean Insurance Company upon any other charter or freight except the guano charter?

A. I did not at that time.

Q. Upon what voyage had you obtained insurance upon the ship at The Ocean Insurance Company's office at the same time?

A. New York to San Francisco with liberties of Callao, to the Chinchas, and from thence to a port in Europe.

Q. Where did the conversation you have related take place?

A. In The Ocean Insurance Company's office, on Exchange street. Three or four days after that I went for the policies.

Q. Who did you see there?

A. Mr. Wright, I think; no one else. He is secretary of The Ocean Insurance Company.

Q. What was said in relation to this charter?

A. I opened the policy and read, "$6,550 on charter." I says to Wright, you have left out the word guano. Said he, "That don't make any difference, the insurance you effected with Foye was freight, this is charter." I said to him, hadn't you rather have charter than freight?

No, said he, if I get freight and the vessel is wrecked, the freight helps forward itself, whereas charter is a total loss.

Q. Have you stated all the first conversation in relation to what Woodbury said to you about effecting this insurance?

198 A. He said a good deal in relation to not insuring the round voyage. I think I told him I should not insure her guano charter with a war risk. He wanted to know why. I told him the Southern Confederacy privateers did not burn guano ships. He referred me to one instance where it had been done.

Q. State what else you recollect was said in relation to that subject-matter of insurance at Woodbury's office at the first conversation, if anything.

(Defendant objects to both form and substance.)

A. I told him I would put implicit confidence in his insuring me—told him I had made a mistake in insuring the last time, and I wanted this guano charter insured out, and I wanted no mistake about it. He gave me to understand there should be none.

Q. Examine paper marked 5, and papers connected therewith, and state whether or not you handed those to the officers of The Ocean Insurance Company as proofs of loss of this vessel under this policy.

A. I presume I did; I handed them the ones Capt. Melcher handed me—this, or one like it, and a notice.

Q. Was any objection made at that time to the sufficiency of the proofs of loss by any of the company?

A. Woodbury said he should not accept it as a total loss. No; I think not.

Q. Was any objection made as to sufficiency of them when you presented them?

A. They took them, that is all I know about it; they did not pay me. They told me they would pay as soon as the adjusters came for the proof from New York.

Q. The adjustments of their insurance in New York?

A. I so understood it.

Q. State what excuse for not paying Woodbury made in this case.

A. He made none; he said they were going to pay as soon as the New York folks paid, and suggested most any time I might call for it.

199 Q. Did he state to you they had reinsured this loss in the New York Sun office?

Q. He did.

Q. Had Capt. Melcher arrived home at that time?

A. He was in the United States, I don't know where.

(All the foregoing testimony of Andrew S. Sawyer was seasonably objected to by defendant's counsel, and admitted by the court subject to objection.)

Cross-examined:

Mr. Woodbury is dead, or reported to be dead. I signed a written application for this insurance.

Direct resumed:

Mr. Wright was present at the first conversation. He is not dead. I think he is the present secretary of the company.

Deposition of Thomas Neill.

I, Thomas Neill, of Boston, county of Suffolk, and commonwealth of

Massachusetts, of lawful age, on oath depose and say, in answer to interrogatories, as follows:

Examined by A. A. STROUT:

I am forty-two years old; am a master mariner by occupation; have followed the sea about twenty-five years; have been a master mariner about sixteen; am acquainted with George M. Melcher, formerly master of the ship Charles S. Pennell. About the fifth or sixth of June, 1864, I saw the ship Charles S. Pennell in the harbor of Rio Janeiro; the ship put in there in a damaged and leaky condition. The day after she arrived in port, went on board in company with Capt. Neely, of the ship Eastern Star, Mr. William V. V. Ledgerwood, agent of the New York Board of Underwriters, and Mr. Church, carpenter of the British admiral's flag-ship, then in port, at the request of the American
200 consul, James Munroe. We four acted as a survey upon the ship Charles S. Pennell, and under authority of a warrant issued by the American consul. The ship was lying at the usual anchorage for ships when they first arrive, about half a mile from the town. We made the survey about midday; we made as thorough an examination of the ship at that time as could be made; the ship was then drawing about twenty (20) feet of water; outside we found the most of the treenails started, both old and new treenails—the ship having been recently refastened; I tried many of the treenails myself with a mallet, on the outside of the ship, and found them broken. I ascertained that by striking them, the sound and the fact that the blow would dwell indicated that the treenail was broken, a fact to which I called Mr. Ledgerwood's attention particularly. We also found butts outside strained, fashion pieces started, some of the outside planking across the stern, above the transoms, started; the seams of outside planking showed signs of being strained; the ship was too deep in the water to observe the condition of much of her copper; her shear was broken, but worse on the starboard than on the port side—by the word shear, I mean the original lines of the ship—she was hogged in the midship section; on deck we found scarfs in rails, drawn; butts on waterways and covering-board opened; waterway seams in upper deck opened, and deck coats torn off bilge-pumps; don't recollect whether the houses were started or not; do not remember whether the thick work around the masts, on the upper deck, were started or not; the facts of the scarfs in the rail and the butts opened, in connection with the general appearance of the ship outside, indicated that the ship had been aground, and had been hogged. As near as I remember, the hatches were on and properly secured, by being calked, tarpaulined, and battened; we tried the pump and found the ship leaking at the rate of two inches per hour; we found about two feet of water in the well
201 when we sounded—leaking at that rate it would take the men more than one-half of the time to keep the ship clear. (Defendants object to any statements made to deponent by other persons.) I proposed to sweep the ship's bottom with a rope. Captain Neely and myself got a rope under the ship's bottom forward; we got the rope along the ship's bottom to about ten feet abaft her fore foot, where the rope became entangled in some splinters or broken copper on her bottom; after working some time we got the rope clear of that obstruction, and worked it along to about ten or twelve feet abaft the foremast, where it got jambed so tight that we could not get it any further. Capt. Neely held the end of the rope on the opposite side of the ship from myself. I told him to let the end go, intending to have the rope hauled in; it

being a new rope I called some of the crew to where I was. I told them to haul it in, but the united efforts of several of them could not haul it in. After due consultation with my cosurveyors, we were of the unanimous opinion that it was highly necessary that the ship should be discharged forthwith for further examination and survey, and recommended accordingly. A rough copy of our report was made by Mr. Ledgerwood at his store; a clean copy was afterwards made by him; returned to the United States consulate, was there signed, and deposited on file.

1st Q. Was Capt. Melcher present at your deliberations, and when you made your report to the American consul?

A. Capt. Melcher was on board his ship; he did not accompany us on our survey, nor was he present at our consultation after the survey.

The next regular examination was made fifteen or sixteen days after the first. At the request of the American consul and under his warrant, as in the first instance, the second regular survey was com-
202 posed of Capt. Neely, of the ship Eastern Star; Mr. V. V. Ledgerwood, agent of New York Board of Underwriters; Mr. Philips, acting carpenter United States ship Wachusetts, and myself. Mr. Church, who was on the first survey, was not on the second, as his ship had left the port. We went on board, as near as I can remember, the middle of the day. The leak of the vessel had not decreased, although the ship had a greater part of her cargo out, and was only drawing about eleven feet of water; still, as near as I can remember, there was no diminution in her leaking. The ship had steamed very badly, and the steam had condensed under the upper deck, and the water was dropping onto the lower deck. As we preferred to have a little more of the cargo out, we postponed completing our survey until the ship was further discharged. In the first part of July, I do not remember the date, we again proceeded on board the ship and completed our survey. The cargo was then mostly out of the ship, some two hundred tons of coal or upwards remaining on board. A gang of men had just been pumping the ship, and stopped for a breathing spell; laborers from the lower hold were shovelling coal, standing in water almost knee-deep on the floor of the ship. At this last survey the vessel was drawing about eleven feet, and we could see more of the copper of the vessel than at our first survey.

2d Q. Will you please state what you found on your second survey?

A. The broken shear of the vessel showed more plainly as we had a better view; the copper, so far as we could see, was generally in a bad condition, more particularly on the starboard side, between the forward part of the main rigging and the after part of the mizzen rigging, where it was not only drawn and wrinkled, but rolled in a manner that I had never seen copper before on a ship's bottom; it was rolled in rolls nearly as large as my arm at the wrists; some of the copper was off, the heads of the nails being broken off; the
203 oakum was protruding from the seams where the seams were exposed. Also, forward at the stem, the copper seemed to have been driven upward, the stem seemed to have been lifted and to have driven the copper upward. I don't recollect whether or not any butts were exposed under the copper; did not strip copper off at that time to examine the butts underneath; the ship was coppered, I think, to nineteen and a half or twenty feet. I do not remember whether the stem was out of its line horizontally or not. We examined the ship between decks; on going into the ship between decks we found that the ship had been recently most thoroughly repaired and fastened; the repairs consisted of thick streaks around the sides of the ship, and

thoroughly fastened up and down, and out and in, and diagonally braced at the sides, from end to end; also, beams in between decks, forward of the foremast, and abaft mizzenmast. About half way between the upper and lower decks those beams were secured by knees in the usual manner—that is, by hanging and lodging knees. I do not remember how many beams there were; the repairs that I noticed in the lower hold were partner beams throughout the lower hold; new middle binding, new hooks and pointers, bilge and sister keelsons all thoroughly fastened, and the work generally done in a most workmanlike manner. I saw nothing about the ship that indicated decay, or that would render her unseaworthy, outside of the injuries which she had received. Between decks, we found the wedges of the mainmast all driven up; hanging knees in the after part of between decks badly gauged, and lodging knees started; the ship seemed to have spread, the new partner beams were loosened from the sides; the ship otherwise showing signs between decks of a general strain throughout. The bilge pumps in the between decks had been working up and down, more particularly on the starboard side; her stanchions gener-
204 ally were started on the upper decks. In the lower hold forward, the breasthooks and pointers, all started from frame, in some places nearly an inch, and scarfs drawn, so that I could run my hand between the breasthooks and the ship. Nearly all the hanging and lodging knees in the lower hold were more or less started. I do not remember of a single knee that was not started; some were started from the sides three-eighths of an inch or more, I should judge; scarfs of new middle binding also were started and drawn; the ends of the beams in the lower hold were started from the sides, the ship seemingly having spread. Some of the stanchions in the lower hold were started, and clamps broken; the ends of the ceiling planks in the after hold had been working. We could not get at the ship's timbers at the time to examine them, because they were covered with coal left in to ballast the ship. I am satisfied in my own mind, from the manner in which the ship had worked, that some of her floor timbers of the starboard side must have been broken; the general appearance of the ship on the inside was of a ship in a badly wrecked condition. She was shaken throughout, and her timbers, braces, knees, and fastenings were loosened; her shape was changed by being spread and hogged. I noticed that the through treenails in the ship were started on the inside; the holes of treenails were enlarged by their working, and their usefulness as fastenings was thereby destroyed. I observed a great many new treenails, amounting, I should suppose, to several thousand, had been used in repairing the ship. In repairing the ship, it would be necessary to bore out all, or nearly all, of these treenails and put in others of an increased size in order to make them effective as a fastening; the scarfs of new sister keelsons were started. We made up our second report at Mr. Ledgerwood's store, a rough copy, as in the first instance. A clean copy was soon afterwards made, carried to the American consulate, and signed by
205 all the surveyors, and deposited on file at the consulate. We all unanimously agreed as to these injuries which this vessel had received. During the second survey Capt. Melcher, I believe, was on board the ship, but did not interfere in any way with our proceedings. He kept aloof from us, and did not influence or attempt to influence any part of our proceedings on either survey, but left us to ourselves; and when the report of our survey was made up at Mr. Ledgerwood's store, Capt. Melcher, as near as I can remember, was not present. These surveys

and proceedings were conducted under the strict supervision of Mr. Ledgerwood, on behalf of the New York Board of Underwriters.

3rd. Q. What prevented the ship from breaking up?

A. In my opinion the ship was prevented from breaking up at that time by the additional timber and fastening that has recently been put in the ship. I considered that the ship, previously to her stranding on the reef, was stronger than she ever had been before the additional timber and fastening had been put in her; the diagonal bracing had a very great effect toward strengthening the ship, and is not usually found in ships, according to my experience. The survey recommended thorough repairs of the injuries above stated to be made; but at that time we had not examined her bottom, and did not know the extent of the injuries. I then expressed the opinion to the other surveyors and to Capt. Melcher, I think, that the ship could never be repaired and made as good as she was before these injuries. Mr. Ledgerwood drew up the recommendations; we recommended that sufficient coal should be left in the ship as ballast, and that the ship should be docked to ascertain what injuries, if any, the ship had sustained on her bottom; before that was done I sailed from the port, and therefore did not participate in the subsequent surveys.

206 4th. Q. Please state what experience you have had in building and repairing vessels.

A. I have superintended the building of one new ship of more than eleven hundred tons; I have superintended repairs three times on vessels to a very heavy amount. I have acted as surveyor on about a dozen different ships, and consider myself well acquainted with the construction and repairing of the vessels.

5th. Q. What facilities for docking vessels for repairs were there at Rio Janeiro at that time of the survey?

A. There was but one dock in the place, which belonged to the government, and much difficulty was experienced for examining the Charles S. Pennell, on account of the number of government vessels waiting to be repaired.

6th Q. Could the Charles S. Pennell have been safely "hove down" for repairs?

A. I think that the ship could have been "hove down" to calk and copper with comparative safety, but it would have been highly dangerously to remove outside planking below light-water line for general repairs.

7th Q. Why?

A. Because if plank were removed below light-water line, and a gale came on, the ship would probably fill and sink, and the harbor is exposed to southerly gales which send in, at times, very heavy seas.

The business of ship-carpentering at Rio Janeiro, so far as I know, amounted at that time to a monopoly, being in the hands of a very few firms; nearly all ship material for repairs had to be imported, including timber in part, copper, felt, pitch, metal sheathing, nails, tar, iron, and other materials used in repairs. I made an estimate of the cost of repairing the injuries I surveyed, after the second survey; I made the estimate at leisure on board of my own ship for my satisfaction; I based my estimate of costs of repairs on the prices of labor and mate-

207 rials given me at Rio Janeiro at that time; I do not know now what those prices were, but I do remember that the sum total of my estimate was upwards of twenty-two thousand American gold dollars; this was to include the metal sheathing for ship, but exclusive of any other repairs to the bottom, as I was ignorant of their nature and

extent. This estimate did not include cost of funds to repair, but was simply costs of repairs at face of bills.

8th Q. What would have been the relative cost of the repairs in Rio Janeiro at that time, of the injuries above stated, as surveyed by you, compared with the value of the ship after she should have been repaired?

(Objected to by Mr. Rand.)

A. I do not recollect that I made any comparison at that time.

9th Q. Could the vessel, in your judgment, have been repaired in Rio Janeiro?

A. In my judgment the ship could have been repaired, but the repairs could not have been thorough, and the costs of repairs would have been greatly in excess of the value of the vessel.

10th Q. Would or not, in your judgment, the cost of repairing the Charles S. Pennell been in excess of the value of the vessel after the repairs?

(Objected to by Mr. Rand.)

A. Yes, sir; such is my opinion.

11th Q. State whether or not it would have been safe or prudent for Capt. Melcher to have attempted to return to a port of the United States in the Charles S. Pennell in the condition in which she was when you saw her in the port of Rio Janeiro.

A. It was not safe to go to any port in the United States, and not only was it not safe to go to any port in the United States, but it was not even safe to move her from one port to another in Brazil.

12th Q. State whether or not you consulted with any of the
208 other surveyors as to the prudence of taking the ship to a port in the United States; and, if so, with whom, and what conference did you have?

(Defendants object as to any conversations of the witness with any other person.)

A. I had a consultation with Mr. Ledgerwood only; he asked me my opinion as to the feasibility of sending the ship to the United States; I objected to the ship being so sent, and gave my reasons therefor, after which Mr. Ledgerwood decided that the ship had better remain where she was, and the subject was dropped.

13th Q. What reasons did you give Mr. Ledgerwood?

(Objected as above.)

A. One reason was the unseaworthiness of the ship; another reason was that I did not think he had any authority to act in the matter, and another reason was the high probability of the condemnation of the ship in the United States even if she was so sent.

14th Q. What would have been the effect of gales or continuous heavy weather upon the Chas. S. Pennell, in the condition in which you saw her in Rio Janeiro, had she met them on a voyage to the United States?

A. My opinion is that she would not have stood ordinary weather, setting aside heavy gales; I mean to say, that she would have foundered in consequence of a general leak.

15th Q. Will you please state the condition of public sentiment in Rio Janeiro, in 1864, toward Northern men and Northern vessels?

(Objected to by Mr. Rand.)

A. In commercial communities it was decidedly against Northern interests.

16th Q. State whether or not at that time there was any steam communication between Rio Janeiro and New York?

A. I believe there was none except by way of Europe.

209 17th Q. Did you intend that your recommendations should be final, or depend upon the completion of the survey and the obtaining of estimates and proposals for repairs?

A. Although the recommendations for repairs in the report of the second survey were complete in themselves, still I consider that they must necessarily be connected with report of final survey. No proposals or estimates of repairs had been submitted to us, nor had they been required, as the survey of her injuries was not complete as we had not examined her bottom. I sailed from Rio Janeiro on or about the 22d of July, 1864.

18th Q. Under the circumstances of the case at Rio Janeiro, what, in your opinion, was the proper and only course for Captain Melcher to pursue in relation to the ship Charles S. Pennell?

(Objected to by Mr. Rand.)

A. I am satisfied, from what I saw of the ship myself, and from the condition of her bottom, as was afterwards made known to me, that a sale of the ship was the only course to be pursued, and transshipment of cargo to port of destination.

19th Q. From your own knowledge and observation of the circumstances attendant upon and the condition of the ship at Rio Janeiro, aside from what was afterwards told you, what, in your opinion, was the proper course for the master to pursue?

(Objected to by Mr. Rand.)

A. In my opinion, a sale of the ship was the only proper course to be pursued, and I expressed that opinion before leaving Rio Janeiro.

(Paper marked A shown deponent.)

20th Q. Are you acquainted with the signature of James Monroe, American consul at Rio Janeiro, in 1864?

A. I am.

210 21st Q. Are you acquainted with the seal of the United States consulate at Rio Janeiro?

A. I am.

22d Q. Please examine the paper marked A herewith produced and shown you, and marked A by the justice taking this deposition, and state whether or not the signature thereto annexed is the signature of James Monroe, then United States consul at Rio Janeiro; I mean the signature upon the certificate upon the last page of the paper, and whether the seals annexed to said paper are the seals of said consul, used by him at the consulate in said Rio Janeiro in 1864.

A. That is the signature of James Monroe, at that time consul; the impression of the seal is a fac simile of the seal of the consulate at the time; by this I mean that I have no doubt whatever they are the seals of the consulate.

23d Q. Please examine the paper marked A, the parts numbered 2, 3, 5, and 6, purporting to be the warrant and the report of the surveyors in the surveys above testified to by you, and state whether or not they are true copies of the original documents signed by you.

A. They are true copies of the original documents by me signed, and by the co-surveyors.

24th Q. Will you please state whether the Charles S. Pennell appeared to have sustained the injuries stated in said reports, and were said reports signed by the other surveyors as well as yourself?

A. The Charles S. Pennell had sustained all the injuries specified in those reports, and the original reports of surveys were signed by all the surveyors, and were deposited in the United States consulate.

25th Q. Upon what voyage were you bound at the time of your being in Rio Janeiro, and for what purpose?

211 A. I was under charter to go to Callao and the Chincha Islands to load a cargo of guano for Hamburg or Rotterdam, to call at Cowes for orders.

26th Q. By whom was your charter-party signed?

A. By myself of the one part, and by A. J. Shön & Co., and J. D. Mutzenbecher Sons, agents of Henry Witt & Shutte, Lima, agents of the Government of Peru.

27th Q. Please examine the charter-party, dated January 30th, 1864, marked B by justice taking this deposition, and shown you by him, and state whether it differs, if at all, from the charter-party above testified to by you?

A. It is identical except the name of the captain, the date, certificate as to stamp. In other words, it is the same form of charter-party, signed by the same parties as agents, and with the same rate of freight, the captain and ship different, and date of sailing. This is the usual form of charter-party in the guano trade in 1864, and signed by the acting agents at that time. I performed my voyage and received my freight under that charter-party. It was the second voyage I had made under a similar charter-party, and received my freight.

28th Q. Were A. J. Schön & Co., and J. D. Mutzenbecher Sons, whose names are on the charter-party shown you, acting agents of Henry Witt & Shutte, and were these last acting agents of the government in Peru in 1864?

A. They were. I have seen other charter-parties of like purport, bearing the signature of these same agents, upon which ship-owners and ship masters acted in the usual course of business, and accepted the signature as genuine.

I have made three different voyages around Cape Horn, two from Europe, and one from the United States.

212 28 b. Q. Are you acquainted with the usual route pursued by navigators in voyages from New York around Cape Horn to San Francisco?

A. I am.

29th Q. In such voyages made in the spring of the year, at what point of longitude is it usual to cross the equator?

A. From 29° to 32° west. Mostly to the westward of 30°.

30th Q. Would 29° 32′ west be a usual and prudent place to cross the equator?

A. I think it would be further east than is necessary.

31st Q. In going down the Brazilian coast, what winds do you usually meet?

A. After we get south of the equator, southeasterly variable.

32d Q. Upon what tack do navigators unsually sail with southeasterly variable winds, bound around Cape Horn?

A. Keep on the port tack so long as they possibly can, during the hours of daylight to approach the land boldly, to make latitude, and in the night stand off, if necessary, for safety.

33d Q. Would a navigator put his vessel on any tack to lose latitude or a southward progress, unless compelled to do so by proximity to the land, on a voyage around Cape Horn?

A. Most certainly he should not.

34th Q. How near would a navigator of prudence approach the shore in day-time, running down the Brazilian coast, if necessary to make latitude?

A. A man could stand in with safety until he could see land plainly off the ship's deck, and in many instances could approach within a mile or two with safety.

35th Q. Are you acquainted with the Abrolhos islands, channel, and shoals; and, if yea, state your means of knowledge of the same?

213 A. I know the position of the Abrolhos by the chart, and have been becalmed within four or five miles of the light-house on the Abrolhos islands, and being becalmed, have caught fish on the Abrolhos shoals.

36th Q. State your position at that time.

A. My position at that time was about east-northeast from the light-house; there was no land visible from mast-head or from on decks, except the Abrolhos islands. The Abrolhos channel is distant from the main land from fifteen to eighteen miles, and it is neither strange nor unusual for ships to get close in off those islands when bound around Cape Horn; the vessel I commanded at the time I was off the Abrolhos was 1,128 tons, new measurement.

37th Q. Have you, at my request, laid down upon the chart of the Brazilian coast the position of a vessel in latitude 17° 18′ south, longitude 38° 42′ west?

A. I have.

38th Q. Will you now state whether the position of a vessel at that point, in open day, was unusual or imprudent, or any deviation from the voyage ordinarily pursued by navigators in going from New York around Cape Horn to San Francisco in sailing vessels?

A. So far as I know it was not unusual; it certainly was not imprudent or dangerous, nor was it a deviation from the usual course.

39th Q. Did Capt. Melcher, while in Rio Janeiro, to your knowledge, influence or attempt to influence yourself or any other member of the board of survey, for the purpose of procuring a condemnation of the Charles S. Pennell, or any recommendation for a sale of the same?

A. He did not.

40th Q. Did Capt. Melcher express to you any regret that the disaster had befallen his vessel?

(Objected to by Mr. Rand.)

A. He did frequently.

214 41st Q. Will you state for what sort of a voyage Capt. Melcher was provisioned and fitted out?

A. I considered the Charles S. Pennell as abundantly supplied for fifteen months' voyage at least.

42d Q. Could funds have been raised on the bottomry of the Charles S. Pennell at Rio Janeiro in 1864 for repairs?

A. I consider it would have been absolutely impossible, as she was a Northern ship sailing under the American flag, and considering the heavy amount required to repair her.

43d Q. In your opinion, would it have been prudent to put temporary repairs upon the vessel and taken her to a port in the United States?

A. No; the nature of the damage was such that temporary repairs could not have been well made, sufficient to make the vessel seaworthy for a voyage to any port in the United States, and it is doubtful if any funds could have been raised at that time and place.

Cross-interrogatories propounded by counsel for defendants:

1st Q. When and where did you last see George M. Melcher?

A. I saw him last this morning; met him on the street and accompanied him into this office.

2d Q. Did the Charles S. Pennell lie afloat in the harbor of Rio from the 5th or 6th of June to the time of your leaving in the latter part of July?

A. Yes, sir; she did.

3d Q. At your first visit to the ship, how many times did you try the pumps, and at what intervals?

A. First tried the pumps when we went on board; sounded accurately; ascertained the exact quantity of water in the well, and then again one hour afterwards.

215 4th Q. How do you know that the ship leaked as much at your second visit as at your first?

A. By sounding again in a similar manner.

5th Q. Did you try the pumps; and, if so, at what intervals?

A. We did, at the intervals of half an hour or an hour; I now forget which.

6th Q. Do you know what was done with the ship after all the different set of surveyors had got through the formalities of survey; I mean all the surveys?

A. I do not, of my own knowledge.

7th Q. In making your estimate of the cost of repairing the ship, of whom did you inquire the cost of labor and materials?

A. I do not remember the names, but I do remember at the time they were responsible parties.

8th Q. Do you say that in June and July, 1864, there was not steam communication between Rio and New York independent of European lines?

A. I did not know of any regular steam communication then, and do not remember any now.

9th Q. How do you know that the papers shown to you, and marked A, 2, 3, 5, 6, are true copies of the original documents signed by you?

A. I know, because, on perusal of those papers, the matter contained therein comes back quite fresh to my memory, and many points contained therein have been fixed on my memory.

10th Q. Do you mean to swear that those papers are exact copies of the original documents you signed?

A. I mean to swear that I am fully satisfied that they are.

11th Q. How are you satisfied?

A. I am satisfied, as before stated, that on perusal the matter comes back fresh to my memory.

216 12th Q. Describe the usual route pursued by sailing vessels bound from New York around Cape Horn to San Francisco.

A. On leaving New York, they make their way to the equator as best they can, crossing the equator in the longitude of from 30° to 33° west; then along the coast of Brazil through the southeast trades and variables, as a rule keeping on the port tack so long as they can consistent with safety, it being usual at times to approach the coast of Brazil very close; after getting through the southeast trades and variables, it is usual, when it can be done, to sight the land from point to point, the projecting headlands, to the vicinity of Cape Horn, inside of the Falkland Islands.

13th Q. Is it usual or proper for sailing vessels bound from New York to San Francisco to go through the Abrolhos channel?

A. It is not.

Direct interrogatories resumed by counsel for plaintiffs:

1st Q. If, on going down the coast of Brazil, a vessel gets jammed in

by the winds and currents near the coast, and in the neighborhood of the Abrolhos channel, and the winds and currents head her off and prevent her from returning, do you think it would be unsafe or imprudent for the master, in open day, to take his vessel through the Abrolhos channel?

A. It would be neither unsafe nor imprudent; he would be obliged to go through.

2d Q. What depth of water do the charts show in the Abrolhos channel?

A. Seven to thirteen fathoms.

3d Q. What is the state of the tides in the neighborhood of the Abrolhos?

A. I cannot say.

THOMAS NEILL.

217 *Deposition of Horace W. Nealey.*

I, Horace W. Nealey, of Bowdoinham, in the State of Maine, of lawful age to testify, on oath depose and say, in answer to interrogatories propounded to me, as follows:

Direct examination by SHEPLEY & STROUT, counsel for plaintiff:

I go to sea for a living. I am a master mariner. I have followed the sea nineteen years. Have been a master mariner seven years. I am acquainted with George M. Melcher, formerly master of ship Charles S. Pennell. I became acquainted with him in 1864, at Rio Janeiro. I saw the ship Charles S. Pennell at Rio Janeiro, the first June, A. D. 1864—third or fourth of June, I think. She came in in distress. I first saw her lying at anchor in the bay. I made a personal examination of the vessel at the request of the American consul, James Monroe. I was one of four. I made three examinations on the hull of the ship while she was lying in the bay at Rio Janeiro, and one on the hatches.

The first examination was made on the sixth of June by myself, Captain Neill, of ship Edward Hyman, a Mr. Church, carpenter of an English man-of-war vessel, and a Mr. Van V. Ledgerwood, agent for the New York underwriters.

The gentlemen whom I have named, together with myself, acted as a survey upon the ship. We acted under a warrant from the American consul.

We proceeded first to the ship and examined the ship's shearlines, and found them badly changed. By the shear of a ship is meant the outline or model of the ship. In this case we found the ship humped up in the middle, the bows dropping down. She was what is
218 called hogged. She was full of cargo at that time. It was what is called a general cargo, with the exception of five hundred tons of coal in the lower hold.

We found quite a number of butts started, oakum started out on the outside, wood-ends and fashion-pieces started.

Fashion-piece is a piece that goes on on the outside on the two quarters of a ship for the purpose of fending off.

We did not make any examination inside or between decks. We found the water-ways much strained and started, butts, and covering-boards, and plank-shears, scarfs in rail, drawn badly.

We swept the bottom with a line from forward aft; took a line and sunk it under the bow, with a man holding each end, and carried it back with the tide, to see if there was any trouble with the bottom of the ship.

The line brought up, I think, about ten feet abaft the foremast; could not be cleared.

We sounded the pumps and found twenty-eight and three-quarters inches of water in the ship. We reckoned she made two inches an hour at that time. We waited about an hour, and the water gained about two inches.

Manning the pumps, both pumps, it would take about half the time, smart work, to keep her clear at that rate.

I believe we made no further examination at that time; we could not, on account of the cargo, and ordered her to be discharged for further survey. It was fifteen or sixteen days before we made any further examination. I think the second survey was on June 22d. She was lying in the bay, a little nearer the town then, at an island, the name of which I forget.

I was one of the second survey; Capt. Neill, and Mr. Ledgerwood, and Mr. Phillips, carpenter of the U. S. war ship Wachusetts, were the other gentlemen in the second survey. We all examined the ship.

219 The ninth of June I was called, with Mr. Ledgerwood, to survey the hatches, and to see that they were properly secured, and the cargo safe.

On June 22d the cargo was all out between decks and the principal part out of the hold. The laborers were standing in the water in the lower hold and removing the coal.

At that time we found the copper outside badly wrinkled and broken, puffed out in many places; oakum working out or hanging out of butts in many places. We found the copper badly wrinkled up and down in the vicinity of the cut-water, which lead us to suppose that the cut-water had been started upwards.

From the foremast to abaft the mizzenmast, on the starboard side, the copper was worse than elsewhere. It was badly broken and puffed out. Seven-eighths of the copper, on the outside of the vessel, above the water, was either wrinkled, puffed out, or started, or otherwise injured. Made no further examination outside them.

The ship was then drawing about eleven feet, I believe.

Between decks, the most of the lodging and hanging knees, from the foremast to twelve feet abaft the mainmast, were more or less started or gauged—the ends had worked back and forth, leaving a mark.

The hanging knees are placed under the beams, bolted to the beams, and through the sides.

The lodging knees lie the other way, flatwise, bolted to the beams and sides also.

The mainmast, apparently, had been jumping up and down—wedges all loose. Striking on rocks, or on a hard bar, would cause the mainmast to jump. The bilge-pumps had been working up and down, to the extent of an inch. They are placed in the side, and run down into the bilge of the ship.

220 Int. What did the general appearance of the ship between decks indicate, as to any injury that the ship had received, and the cause of it?

(Objected to by J. & E. M. Rand, counsel for defendants.)

A. It indicated that the ship had pounded on some hard substance with her whole weight, forcing the masts and bilge-pumps up, and also causing the beams and knees to be out of place.

I have stated about all that we saw between decks. The floor of the decks was not started.

The wedges in the ceiling were all loose, and some of them out.

Scarfs and butts of ceiling were worked and started from their places. Hooks between decks were all very good.

In the lower hold we could examine within two feet of the skin—bottom or ceiling of the vessel, and both of the ends were clear.

Hanging knees are built in the hold the same as between decks.

We found all the hanging-knees, lodging-knees, and breast-knees in the hold more or less started. All breasthooks in the lower hold were started and gauged and out of place. A new iron pointer aft also gauged. A new middle binding was started badly. The ship had been repaired a short time before, and new beams and knees put in. They were more or less started—this new work.

The new work was started from a quarter to three-quarters of an inch, and some of the scarfs were drawn an inch. By their being drawn, I mean that they were pulled apart.

The bolts in the knees and hooks more or less started, and the tree-nails the same.

Heads of stanchions had been working on beams—chafed badly; some of the bands were off.

In the ceiling plank the butts were started and scarfs drawn.

221 The ship in the lower hold was shaken to pieces; that was the general appearance of it. She had the general appearance in the lower hold of being spread.

By being spread, I mean made wider than she was originally built. We could see where she was started off from the beams.

I saw nothing further in the lower hold.

Up to June 22d there was no diminution of the leak, I think there were twenty-one inches of water in her then.

She was then making about the same as at the time of the first survey.

We could not make any further examination of her bottom at that time. We recommended that she should keep in ballast enough to work with safety, and that she should be placed in the dry dock for further survey. All the gentlemen of the survey concurred in this recommendation.

The dry dock was a short distance from Rio Janeiro, on an island. That was the government dock—which was the only one at Rio at that time.

I examined the Charles S. Pennall after she was placed upon the dry dock. I was one of the survey called upon her there. The other gentlemen, comprising the survey, were Captain Bangs, of the ship Mary Bangs, and Mr. Leavitt, naval constructor there, a government man, and Mr. Ledgerwood.

She was lying in the government dry dock at the time of the second survey. We then had full opportunity for the examination of her bottom.

The lines of the ship were very badly out of place. The bow drooped down badly. She had the appearance of being hogged. Forward of her foremast her bow had actually settled. We could not see then that she had the appearance of being spread. Her stem was driven up and off, and slued to starboard.

The false keel was all gone—the entire length. Main keel was

222 gone forward to abaft the foremast some ten feet, I think. Under mainmast the keel was badly broken, crushed, and chafed off for several feet.

We calculated that some four inches of the keel were ground off for fifteen feet under the mainmasts—more or less gone for the whole length of the keel. The appearance was that she had been pounding, right

under the mainmast, with her whole weight upon a rock, forcing the copper up the garboard seam—the first streak alongside the keel. The condition of the vessel indicated that she had received very heavy blows from pounding.

By the appearance of the keelson, the timbers were spread off for an inch, some of them by the force of a blow received.

The copper was in a bad condition, and badly wrinkled forward of the stern-post outside. A large quantity of the copper was off.

The scarf in the keel was drawn; the keel split badly. The keel was in three pieces, I think.

The copper on the starboard bilge, for a space of one hundred square feet, was all off, and some of the planks were within an inch of being through.

I don't think there was a smooth sheet of copper on the bottom of the vessel. I know there was not. Some of it was wrinkled worse than the rest. The starboard side was much worse than the port. Some of it was broken and off, and some of it was only slightly wrinkled. We found water pouring out freely from the garboard seam, under the mainmast. I believe she was put on the dry dock about the tide before we examined her. It was only a short time before, at any rate, and the water had not done running out of her. The dock had just been dry.

There was a good deal of mud sticking to her bottom and in her seams where the copper was off, and some gravel ground into her bilge. I don't recollect that there were any rocks.

223 The coal had not all been taken out of her when we made this examination on the dry dock. I think she was clear about the mainmast, and both ends were clear.

We made no further particular examination of the hold of the vessel, except about the mainmast, and found that the keelson had worked up. The ceiling plank next to the sister keelson had been taken off, and we could see the floor timbers. They were all more or less started, some up and some down, along the midships, as far as we examined. There was a plank taken off in the bilge, but we could not ascertain much of any damage, that I recollect. It showed that the timbers had been working, the same as it did by the sister keelson, but we could not find any broken timbers.

The timbers do not work, in an ordinary passage, so that you can perceive that they work. In any vessel they must work some, but not so as to be perceived, unless the ship is subjected to some violent strain.

The survey recommended that all hanging and lodging knees in the ship should be refastened, and that all the knees which were badly started should be taken off, refitted, and refastened with increased sized iron. All breast hooks in the ship should be taken out, refitted, and refastened. We recommended that the new middle binding should all be refastened, and all stanchions should be secured in the best manner possible. That there should be an entirely new keel and keelson and stem; that all planks should be stripped off from covering board to floor-heads, and furnished with new planking and new fastening; that sufficient ceiling should be taken out of the hold to ascertain any damage to any futtocks or any other timbers of the ship; that water-ways between decks should be rebolted up and down, out and in; and that the ship should be recalked and coppered over felt. Those were the principal points recommended by the survey, as I recollect them now.

The ship was taken from the dry dock. The survey ordered her from the dry dock to save expense.

224 Some few repairs were done on her before she was moved from the dry dock. Her stem was calked and also under the mainmast.

The expense of the government dry dock was so great that it would not do for her to lie there. She would have to be hove down for repairs. The government would not allow her to be repaired there on any condition. She was only put there for examination. I think she was in the dry dock for two days.

There were advertisements in the Journal of Commerce, in English and Portuguese, for estimates of the expense of repairing the ship. The American consul, I believe, advertised for proposals. I don't know that he did, but think so.

Estimates of the cost of repairing the ship there, I believe, were submitted to the surveyors. One of the estimates was by Mr. Leavitt, one of the surveyors. Another was by J. F. & A. McLellan, and the third was by a native carpenter there, whose name I don't remember. I judged at the time that these were reasonable and fair estimates, for that port, of the expense of the repairs to be done. The other surveyors concurred with me in that opinion.

At that time we decided that it would cost all of that sum to repair the ship at Rio Janeiro.

The gentlemen comprising the survey, after receiving these estimates, recommended that the ship be sold at public auction for the benefit of all concerned, not being worth repairing.

We recommended that the cargo be forwarded to the port of destination as soon as possible, and with as little expense.

At that time it was very expensive to repair a vessel at Rio Janeiro. The first reason was that there was no dry dock there except the government dock, and the government did not allow foreign mer-
225 chantmen to be repaired in the government docks. I ascertained this while I was there. During the three months I was there the dry dock was full of government steamers.

The carpenters' wages were high. Materials for repairing vessels are about all carried there, except some native woods that they use—iron, oakum, oak, copper, felt, tar, and pitch, and nearly all materials used in repairing vessels are carried there.

I don't remember the rates of interest at that time charged for loans of money on bottomry. There were advertisements at Rio Janeiro, in English and Portuguese, for four days, I think, for money to make these repairs with. The vessel was afterwards sold at public auction. There were before the sale advertisements in the public papers of Rio Janeiro, in English and Portuguese, of the time and place of sale.

I was present at the sale; she was sold by an auctioneer, a Mr. Pinto, I believe. The sale was open and public. The vessel was lying a quarter of a mile from town, at anchor in the bay, at the time of sale. I think she was sold in the forenoon, but cannot swear to the time. The sale was made on board the vessel. I don't know how many were present at the sale; the upper deck was full; about as many as could be there comfortably. The whole deck, fore and aft, was about as full as those present could stand. The auctioneer stood on the upper deck. The American consul was present at the sale.

I don't know what became of the ship after the sale; I left there soon after. Mr. Wm. V. V. Ledgerwood is the agent for the New York underwriters. All these proceedings took place with Mr. Ledgerwood's knowledge; he was at the head of them. Every time I was on board the ship he was there. He was at the sale. The surveys and the sale were with the knowledge and under the direction of the American con-

sul at Rio Janeiro. In making these surveys, we acted under a
226 warrant from the American consul resident at Rio Janeiro. The surveyors made a report in each case. The reports were made unanimously, and were signed by each of the surveyors before named. They were made by all the surveyors before named, and were signed by them all, and were returned to the American consul at Rio Janeiro.

Captain Melcher had his wife and niece as passengers with him on his outward voyage.

Cross-examination by J. & E. M. RAND, counsel for defendants:

Int. 1. At what time in the spring or summer of 1864, did you arrive at Rio Janeiro, and at what time did you leave?

A. I arrived there the fourth day of May, and left the fourteenth of August, I think; am not positive.

Int. 2. How soon after the arrival of the C. S. Pennell at Rio, did you see Captain Melcher, and where did you see him?

A. I saw him the day following on board of his ship.

Int. 3. How did you happen to be on board the C. S. Pennell at that time?

A. I went on board at the request of my wife, to give his ladies an invitation on board of my vessel.

Int. 4. Did you, at that interview, have any conversation with Captain Melcher respecting the then condition of his vessel, and what he proposed to do?

A. No, I did not.

Int. 5. Did you know, before you went on board the C. S. Pennell at that time, that she had sustained and injuries?

A. I heard she had.

Int. 6. From whom did you so hear?

A. I could not tell who told me.

Int. 7. Where did you so hear?

227 A. I could not swear where it was; I was ashore at the time; think it was at Mr. Baldwin's ship chandlery store.

Int. 8. How long did you remain on board the C. S. Pennell at this first visit?

A. Not over five minutes; just long enough to ascertain that the ladies were comfortable.

Int. 9. When did you next see G. M. Melcher?

A. I next saw him on board ship at the first survey.

Int. 10. Was he with you in making the first survey?

A. He was not.

Int. 11. When did you next see Captain Melcher?

A. We used to see him every day after that at the ship chandlery and at other places about town.

Int. 12. Did you, at any time before making your final report, have any conversation with Capt. Melcher respecting the injuries to his vessel, or how they happened, or what should be done respecting them?

A. I did; we talked on it a good deal.

Int. 13. Please state as particularly as you can recollect what he said respecting how the vessel was injured?

A. He told me that he was standing in on the port tack; the wind was ahead; the weather was pleasant and the water quite smooth, he said, when she struck. He said that she struck on a reef and stuck. Said she pounded there hard before she got off. Think he said he got on the middle of the day and remained there all night, but am not positive about it. Don't recollect anything further that he said, except

that it came upon him all unawares. He thought he could stand in a long distance further toward the land.

Int. 14. Please state as particularly as you can recollect what he said to you respecting the injuries his vessel sustained.

228 A. He said, by the appearance of the lines, and by what he should judge from the blows she received, and by her leaking, he should think she was completely shattered all to pieces. I don't recollect anything further.

Int. 15. Please state as particularly as you can what conversation you had with Captain Melcher as to what should be done with or to the ship.

A. I had no conversation with Captain Melcher to that effect nor upon that subject.

Int. 16th. When did Captain Melcher leave Rio?

A. He was there when I left.

Int. 17. Where was the ship when you made the first examination?

A. She was at anchor in the bay, about a quarter of a mile from the town.

Int. 18. How long did she remain at anchor in that place?

A. Could not give a decided answer; think she was moved in three days to the island where she discharged; she discharged her cargo at a wharf on the island.

Int. 19. Did the ship lie afloat while discharging her cargo?

A. She did.

Int. 20. When the ship was taken from the dry dock where was she taken?

A. She was towed about half way from this island to the mainland, a short distance up the bay, and anchored there.

Int. 21. Was that a place of safety for the ship, and could she have there remained in safety until information could be obtained from New York?

A. It was a place of safety; I lay there long enough to get news to New York and back nearly when I was there. The C. S. Pennell could have remained there until information could be received from New York if somebody had been kept on board to pump her.

229 Int. 22. Was the vessel sold at the place mentioned in the answer to cross-interrogatory No. 20?

A. She was.

Int. 23. When was she sold?

A. I think it was the eleventh of August.

Int. 24. For how many days before the sale do you know that her sale was advertised?

A. I know that the sale was advertised three or four days before it took place. I saw the papers.

Int. 25. What was done with her masts and spars after she arrived at Rio?

A. Nothing was done with them except that the top-gallant and royal yards were sent down just before going into the dry dock to make the vessel stiffer. I think, to the best of my recollection, that the top-gallant mast was housed. The ship so remained to the time of sale.

Int. 26. Did her topmasts and lower yards remain up from the time of her arrival until the sale?

A. I think they did.

Int. 27. How long did Capt. Melcher live on board the ship after her arrival at Rio?

Ans. I think he lived on board till they began to take out the coal.

Should say about June 18th that he went on shore. Not many of the crew remained on board after she came off from the dock.

Int. 28. Why did you recommend a sale of the ship?

Ans. One reason was the captain had no money to repair her; could obtain none on bottomry. Another reason was the expense of repairing would amount to more than she was worth—more than she was worth as she lay there damaged.

Int. 29. What was the ship worth as she lay at Rio damaged?

A. I should not suppose that she was worth over ten thousand dollars at the outside.

230 Int. 30. Did the vessel remain at anchor where she was sold till you left the place?

A. To the best of my recollection, she did.

Int. 31. Was the dry dock, to which the ship was taken, a suitable dock and of sufficient size and capacity for a ship of the size of the C. S. Pennell?

A. Yes, it was.

Int. 32. Did the C. S. Pennell sustain any injury of any kind while being taken into the dock, or while in the dock?

A. Not that I am aware of.

Int. 33. Could a ship, damaged as the C. S. Pennell was, have been repaired at Rio at that time?

A. I could not say positive whether the materials for the stem and keel could be obtained there or not. Otherwise she could have been repaired there. There is another article still. Copper could not be obtained there to copper her, unless you waited long enough for it. There was some copper at Rio, but not enough to copper a ship.

Direct examination resumed. SHEPLEY & STOUT, counsel for plaintiff:

Int. I wish to call your attention to the conversation between yourself and Capt. Melcher, inquired of by Mr. Rand, relative to the injuries received by the C. S. Pennell while on the rock. You made some statement as to what Capt. Melcher said about the mast's jumping. Will you please repeat it?

A. He said that all the time she was pounding on the reef there was greater danger of throwing the mast out—the mainmast. For every time she struck the mast would jump, and the rigging would slack, and he kept the crew away from the mainmast for fear it would fall.

HORACE W. NEALEY.

231 HIRAM B. BANGS, sworn, testified:

Reside in Chelsea, Mass. I have been master mariner since 1847, with the exception of five years I remained on shore. I was witness upon the stand in the case of George M. Melcher v. Ocean Insurance Co. I saw the ship Charles S. Pennell in the harbor of Rio Janeiro in 1864. I was one of a survey upon her. My cosurveyors were Capt. Nealey, Mr. Ledgerwood, and some one employed by the government; I think his name was Levet. I was on the last survey that was on the vessel, and that one only. We examined her thoroughly, inside and out; we thought we did; we found her hogged; I should think, from about half way forward of the mainmast forward she was badly hogged. I don't think my recollection serves me how much her bow was dropped down, but I should say at least 18 inches. She appeared to be spread fore and aft from the beams: the knees appeared started off from the side of the ship. The breast-hooks and

pointers forward were in a bad condition. The new pieces, or what I supposed to be new pieces, had worked and appeared to have started off badly, particularly from the starboard side, as if the ship had opened there; and the heads of the bolts that went through were drawn more into the wood than the outside; it appeared to be firm in the outside. The upper end of the pointers were out of place and gauged. The copper was in an awful condition; it was rolled, a great deal of it. Her stem had started considerably over to starboard and ripped up, so that the seam at the hood ends, on the port side, was very open. Under the bottom her keel was chafed very much, more or less the whole length. Under the mainmast it was crushed and split; the water was running through one of these splits in the keel, and also through the garboard streak. The copper, abaft the mainmast in particular, was set-
232 tled up into the seams. The great part of her keel forward was gone right up to the garboard plank. She was evidently all out of shape. She had a terrible wrenching. I don't remember now of seeing mud in the seam; there was a good deal of oakum out of the seams. In the places in the bilge, where she was so badly ground up, were bits or little pieces of what I took to be coral sticking in the wood. Before she went into the dock we put in three sticks or sights (I think Levet suggested it); they were put in horizontal, and when she went into the the dock she was out of line. When she come to rest on the blocks she was entirely out of range. I don't remember how much we thought it was at the time. The keelson was driven up in the first place, and when she came on to the blocks the weight brought it partially down. I tried some of the treenails myself; don't remember whether I used a hammer or mallet, but I used it with one hand. I started a number of the treenails and the hammer did not rebound—the treenail would give and the hammer would dwell; that indicated the fibres of the treenail between the plank and timbers must have been broken. That is the worst of the injuries. The beams, many of them, and, in fact, most of them were started from the side, particularly the starboard side. The scarfs were open. After we examined her on the drydock we give in our report. The consul obtained estimates for repairs. I remember at the time we made some calculations as to the cost of repairing the vessel and cost of material, but what it was I cannot tell now. I made no inquiry particularly as to the cost of the material, because I did not think I was competent of judging how much it would take of this material to repair the ship. I examined the estimates of repairs that were laid before me.

Q. Were those fair and reasonable estimates submitted to you?

(Objected to by counsel for defendants.)

233 Q. There was so much difference in the three estimates that I do not hardly know how to answer that question; my opinion is they were. I saw them at the time they were made.

Q. In your opinion, could the ship have been repaired for the estimates put in?

(Objected to by defendants' coun*cil*.)

A. I do not.

The estimates were furnished in writing.

Q. What was the amount of the estimate of repairs of the vessel submitted to you?

(Objected to by defendants' counsel.)

A. I only remember two; one was fifty-four thousand milreis, and the other sixty-four thousand milreis, I think.

After making this examination, we recommended she should be sold

for the benefit of all concerned. My cosurveyers, Nealey and Ledgerwood, concurred with me in that recommendation. I communicated the fact to Capt. George M. Melcher.

Q. State whether or not at the time you supposed Ledgerwood signed this.

(Objected to by defendants' counsel.)

A. Yes, sir; I always supposed he did.

Q. Did he agree with you in your recommendation for the sale?

(Objected to by defendants' counsel.)

A. Yes, sir.

In my opinion, the vessel could not have been properly repaired in Rio. The cost of repairs of the injuries to the vessel would have exceeded the value of the vessel when repaired. In my opinion, as a shipmaster, it would not have been safe or practicable to have taken the vessel from where she lay in Rio to any port in the United States for repairs. In my opinion, temporary repairs could not have been placed upon the vessel in Rio so that it would have been for the
234 best interest of all concerned to have taken her to a port of the United States to have completed repairs. If the vessel had attempted to have gone to sea in the condition I saw her, in my opinion, she must have foundered. While I was in Rio Captain Melcher never attempted to influence my action as a surveyor, or my judgment or conclusions. I don't know what arrangement might have been made with the dry dock if she had waited long enough, but at that time she was not allowed to occupy the government dock for repairs; it was with a good deal of trouble and persuasion she was allowed to go in to examine her bottom. There was a steamer (Russian, I think) went in the next day after the Pennell came out. I have examined the paper shown me, marked A, containing my condemnation and recommendation of the sale, signed by myself and Capt. Nealey, and purporting to be signed by Mr. Ledgerwood. The statements in this paper are true.

I was present at the sale of the vessel at auction. She was sold, in accordance with my recommendation and that of my cosurveyors, at public auction. I know the consul advertised for funds for repairing her there. He did not obtain them to my knowledge.

Q. Do you think funds could have been obtained on bottomry of the vessel?

(Objected to by defendants' counsel.)

A. No, sir.

Q. Could funds have been obtained on bottomry of the vessel?

(Objected to by defendants' counsel.)

A. No, sir.

Cross-examination waived.

The foregoing testimony has been taken and reduced to writing by the stenographer, under an agreement of counsel to that effect, and is to be used in the two suits George M. Melcher vs. Ocean Insurance Co.

A. A. STROUT,
For Plaintiff.
J. & E. M. RAND,
For Defendants.

235 E.

ANDREW SAWYER, Esq.,

NEW YORK, *March 20th*, 1864.

SIR: The ship C. S. Pennell is now nearly loaded, and will sail in all

of this week. Fanny arrived here safe yesterday. Ben is going 3d mate. Mr. Waterhouse still by the ship, and will probably go the voyage. I want you to insure on my part of the ship as follows:

Say war risk out to San Francisco, ship	$5,000 00
Charter to San Francisco, $26,500, ⅛	3,300 00
Primage on same	1,325 00
Homeward charter from Chinchas, insure out, say 1,750 tons, at £4, £7,000, at current rate of exchange, $52,400, my ⅛	6,550 00
Primage on same	2,650 00
Chronometers, Dent., 1883, Negos, 1261	500 00
And on our effects, clothing, etc	1,000 00
Making total	$19,425 00

How are you Mr. Maffit? I think you had better put 5 or $6,000 more marine risk in case I should lose the ship; war risks are now from 2 to 3 per cent. Capt. Childs has insured his ¼ of ship Guardian, both marine and war risks out and home, on the same round that we are going for 9½ per cent. net; that is probably lower than you can get mine done for. I think you will do better to insure in different offices than you will in one alone.

The policies came all right; have not collected the insurance yet; will let you know the amount when received. Should you go to Boston about insurance, Page, Richardson & Co. will post you up, and if you can't get it done in Portland as low as 2 per cent., I think you had better try the Boston offices. Before I left, the Columbian offered
236 to insure for 2 per cent. war risk, net; and I think that is as low as you will get it done. Of course, do it at the same rate, for I haveno idea of escaping the privateers this time, and I shall want to say, how are you, Mr. Semmes. Good boy; best three in five for the two ships.

You had better attend to this at once, for I might get in trouble before I get clear of New York. I should use three different offices for the amount to be insured; but you, being on the spot, of course, ought to be the best judge, and should you be able to get it done by Wednesday. Please write or telegraph, care of J. O. B. & Co. for I shall probably be detained on account of crew until Saturday, and I shall want to know how to act outside. Good night, old boy. May your shadow never be less.

Your brother,

G. M. MELCHER.

Guano charter-party, marked C.

Charter-party for Hamburg or Rotterdam.

NEW YORK, *30th January*, 1864.

It is hereby mutually agreed between , as agent of the owners and captain of the A 1½ ship C. S. Pennell, 995 tons register. new measurement, on the one part, and Messrs. A. J. Schön & Co., and J. D. Mutzenbecher Sons, merchants and agents of Messrs. Henry Witt & Shutte, Lima, agents of the supreme government of Peru, and their consignees of guano in Germany, on the other part, as follows:

That the said vessel shall sail on or before 1st June, 1864, to San

Francisco, and thence proceed. with all convenient dispatch to
237 the port of Callao, Peru, where the captain shall immediately report his arrival to Messrs. Henry Witt & Shutte, of Lima.

That the said vessel, being then on inspection by the appointed government officer, tight, staunch, and strong, and well conditioned for the voyage, Messrs. Henry Witt & Shutte shall (within forty-eight hours after such report being received) send to the captain or his agents, orders for loading a cargo of guano at the Chincha Islands, to which place the vessel shall at once proceed, calling on her way at Pisco to obtain the necessary pass to load, which shall be given to the captain by the charterers' agent free of expense.

The ship shall convey from Callao to the islands any specie that may be required for the payment of the cargo, and any tools (sent alongside by the charterers' agents whilst the vessel is at anchor in Callao) free of freight; and shall supply, free of charge, either on board or alongside, at the guano ports, any water that may be required by the agents of the charterers, not exceeding ten tons.

At the Chincha Islands, the vessels to be placed under the mangueras to load, or, at the option of the charterers, the cargo to be placed in the ship's boats, and in them conveyed on board at ship's expense and shipper's risk.

The charterers or their agents shall deliver on shore to the captain at Callao, the number of empty bags that they may judge necessary, which the captain shall fill with guano, and sew up (with thread supplied to him for this purpose), using them for the lining of the ship. He shall give a receipt for the quantity of bags delivered to him, shall carry them free of charge; and, at the port of discharge, shall deliver to charterer's agents the same number received; or, should any be missing, he shall pay 1½ real for each bag so short delivered.

238 The owners to find necessary dunnage, and to be responsible for damage by negligence.

The owners to be liable for all damage arising from side-lights or ports.

The guano shall be stowed so that a clear space may be left round the vessel, under the deck, for the purpose of examining the cargo, and removing any water which may have been shipped; and every convenient opportunity shall be taken to examine the guano, and means used to prevent and lessen damage.

The quantity of guano to be shipped shall not exceed one-third above the vessel's register tonnage, new measurement, except with the consent, in writing, of the charterer's agent at Callao, and which consent the charterers undertake shall be given to all ships which their agents have not fair and reasonable grounds for believing to be overloaded, when such consent may be withheld; and if any vessel proceed to sea without such written consent, and loss should be sustained by the charterers upon the guano, and whether the same be of the nature of a particular or general average, or of charges upon the guano, all such loss as between the said owners and charterers shall be deemed to have arisen from the improper loading of the vessel, and the amount of such loss shall be borne and paid by the said owners to the said charterers; but in the case of loss of the nature of particular average, the owners shall only pay such amount as may exceed £3 per cent. upon the net value of the limited cargo of guano hereby agreed to be shipped.

No guano or other dead weight shall be received on board except from the charterers or their agents.

Should political or other circumstances prevent there being sufficient laborers at the loading places, as many of the crew as shall not be absolutely necessary for the safety of the ship shall be sent on
239 shore to load the cargo, they receiving the usual laborer's daily pay while so employed.

Ten running days, Sundays excepted, for each one hundred tons, new register measurement to be allowed the charterers for loading the ship at the islands; nevertheless, in no case shall the charterers have less than thirty, nor more than eighty such days in all. Said days to commence from the day the master gives notice, in writing, of being ready to receive and take on board, and to cease when the charterer's agents give notice that the vessel may leave the islands.

After completing her loading of guano, and having obtained the necessary pass from Pisco, the vessel shall return for her final clearance to Callao, where the captain shall have the liberty of taking in passengers, light goods, and specie on freight for the benefit of the ship. The charterers to have the option of shipping the light goods at current rates. Thirty days shall be allowed the captain for this purpose, which shall be reckoned from his return from the island.

The ship, when laden, shall not go through the Boqueron Passage between the island of San Lorenzo and the main land.

The master to be supplied in the Pacific with a sum not exceeding £750, free of interest and commission, but the cost of insurance to be borne by the owners, and the amount so to be advanced, and the cost of the insurance thereof, shall be in part payment of the freight, at the exchange of 48*d* per dollar currency. And should the charterers or their agents think fit to advance the master beyond the said sum of £750, any sum for repairs, stores, or other disbursements whatsoever, such sums, with interest, commission, and insurance, shall be in part payment of freight at the exchange aforesaid. And it is hereby expressly agreed that the receipt of the master for any such sum or
240 sums of money as shall be supplied or advanced to him by the charterers as aforesaid, shall be conclusive and binding upon the owners, and they shall thereby be prevented, as between them and the charterers, from inquiry into the necessity for or the appropriation of the sum of money which, in such receipts, shall be acknowledged to have been received, and all contributions to general average losses, which (if any) shall become payable in respect to any of such advances as aforesaid, shall be borne and paid by the owners.

Over and above the lay days allowed to the charterers for loading the ship, and to the owners for taking in light freight and specie, each party shall be permitted to detain the vessel for those purposes respectively, for thirty days, the charterers paying to the owners, or the owners paying to the charterers, as the case may be, at the rate of £10 per day, as agreed compensation for such detention.

Should the vessel be unnecessarily detained at any other period of the voyage, such detention to be paid for by the party delinquent to the party observant at the above named rate of demurrage or compensation.

The owners of the vessel to pay all port charges, and the ship to be consigned to Messrs. Henry Witt & Schutte, of Lima, to whom the customary commissions and agency for doing the ship's business shall be paid by the captain. In case the ship should put into Callao or Valparaiso with her cargo of guano on board, she is to be consigned to Messrs. Henry Witt & Schutte.

The captain to sign bills of lading at such rate of freight as charterers

or their agents may direct, and without prejudice to this charter-party.

The said vessel shall, after completing her loading, as before mentioned, proceed to Hamburg or to Rotterdam, calling at Cowes for orders from Messrs. J. D. Mutzenbecher Sons (and for which she
241 is to remain until return of post from Hamburg), unless ordered, in writing, to proceed direct to either Hamburg or Rotterdam by Messrs. Henry Witt & Schutte, and there, according to bills of lading and *and* charter-party, deliver the cargo, which is to be discharged according to the custom of the port, at the rate of not less than thirty-five tons per working day.

The freight to be paid in manner hereinafter mentioned, at the rate of four pounds sterling, in full, per ton of 20 cwt., British net weight of guano, subject, however, to a deduction for the water contained in damaged guano.

On arrival at the port of discharge, £900 shall be paid, subject to the terms and conditions of this charter-party, for disbursements of the ship, three months' interest, at the rate of £5 per cent. per annum being deducted, and the balance, after deducting such sums of money as shall become payable to the charterers under the provisions herein contained, forty-eight hours after the true and right delivery of the whole of the cargo, if discharged in Hamburg, by bills upon Messrs. A. J. Schön & Co., and J. D. Mutzenbecher Sons, at three months'date, at the quoted rate of short-sight exchange on London, on the date of the bills, or in cash at the then quoted rate of short-sight exchange on London, less interest at £5 per cent. per annum, at charterers' option, or if discharged in Rotterdam by bills upon Messrs. A. J. Schön & Co., and J. D. Mutzenbecher Sons, at three months' date, at the exchange of thirteen marks four shillings banco per £ sterling, or in cash at the then quoted rate of short-sight exchange on London, less interest at £5 per annum, at charterers' option.

And in the event of any rival claims to the said freight, Messrs. A. J. Schön & Co., and J. D. Mutzenbecher Sons, shall be at liberty to retain the same in their hands until the right of the respective
242 claimants is determined, or to pay it into court deducting their costs.

The charterers are hereby authorized to retain and deduct from the freights all such damages and sums of money, as well liquidated as unliquidated, to which the owners shall become liable to the charterers, by virtue of, or in any wise in relation to this charter-party, it being the intention of the parties that all claims and demands, of whatever nature, which shall accrue to the said charterers, shall be treated as payments made by the charterers, on account of freight.

The ship, on her return, to be consigned to Messrs. J. D. Mutzenbecher Sons, in Hamburg, or to their agents in Rotterdam, who shall receive the customary commission of 2½ per cent. for attending to the ship's business. The charterers to have the right of appointing the ship's broker, and of fixing the place where the ship is to discharge and deliver her cargo.

Penalty for non-performance of this charter-party, the estimated amount of freight.

The act of God, enemies, fire, and all and every dangers and accidents of the seas, rivers, and navigations of whatever nature and kind soever, during the said voyage, always excepted.

By virtue of contract between the Supreme Government of Peru, and Messrs. Henry Witt & Schutte, of Lima, a commission of two and a half per cent. will be charged on the amount of freight, which, in case

of arrival, is to be deducted from the freight by the charterers, or if the ship does not arrive at her destination, shall be paid to them in Hamburg by the owners. Such commissions being due on signing of this charter-party. Should the vessel not be ready in Callao to proceed to the Chincha Islands on or before the 15th December, 1864, the freight is to be reduced 5*s.* per ton.

243 Made in six originals.

[U. S. I. R. stamp, $10.]

G. M. MELCHER.

Witness to the signature of G. M. Melcher,
C. S. GLIDDEN.

AUG. JOS. SCHÖN & CO.
J. D. MUTZENBECHER SONS.
As Agent for Henry Witt & Schutte.

Witness to the signature of Aug. Jos. Schön & Co.,
J. D. MUTZENBECHER SONS,
AUSTIN MICHARLAW.

This charter-party has been concluded through the intervention of , sworn broker.

[U. S. I. R. stamp, 5 cents.]

I, Ferdinand Laertz, jr., the duly authorized consul of the Supreme Government of Peru, hereby certify that the above-signed Messrs. A. J. Schön & Co., and J. D. Mutzenbecher Sons, have, by the power of attorney, registered in the archives of this consulate, been appointed agents of Messrs. Henry Witt & Schutte, of Lima, the consignees of guano in Germany, under a contract between said Messrs. Henry Witt & Schutte, and the Supreme Government of Peru, under date of 26th February, 1861, and that this charter-party has been entered into with all the formalities required by that contract.

F. LAERTZ, JR.

We certify this to be a true copy of original charter.

NO. 5.—PAPER A.

CONSULATE OF THE UNITED STATES OF AMERICA, PORT OF RIO JANEIRO.

On this sixth day of June, in the year of our Lord eighteen hundred and sixty-four, before me, James Monroe, consul of the United States of America for Rio de Janeiro and the dependencies thereof, personally appeared George M. Melcher, master of the ship or vessel called
244 the Charles S. Pennell, of Bath, of the burden of 968 tons, or thereabouts, and declared that on the first day of April last past, he sailed in and with the said ship from the port of New York, laden with general cargo, and arrived in the said ship at Rio Janeiro on the 5th day of June inst., and the ship having been ashore, hereby enters this note of protest accordingly, to serve and avail him hereafter, if found necessary.

(Signed) G. M. MELCHER,
Master.

Attested:
(Signed) JAMES MONROE,
U. S. Consul.

UNITED STATES CONSULATE, RIO JANEIRO.

I, James Monroe, U. S. consul at Rio Janeiro, do hereby certify the above and foregoing to be a true and correct copy of the original on record at this consulate.

Given under my hand and seal of office this 27th day of July, 1864.

[L. S.] JAMES MONROE,
U. S. Consul.

SURVEYS.

No. 1.—*Application.*

RIO JANEIRO, *June 6th*, 1864.

JAMES MONROE, Esq.,
United States Consul at Rio Janeiro:

SIR: The ship Charles S. Pennell, of Bath, under my command, arrived at this port the 5th inst., from New York, in a damaged and leaky condition, and I have, therefore, to request that you will please call a survey upon the said ship, in order to ascertain her present state and condition, and what had best be done for the interest of the parties concerned.

Very respectfully, your obedient servant,
(Signed) G. M. MELCHER,
Master.

245 No. 2.—*Warrant.*

UNITED STATES CONSULATE,
Rio Janeiro, June 6, 1864.

Capt. H. W. Nealey, American ship Eastern Star; Capt. Thomas Neill, American ship Edward Hyman; Mr. G. H. Church, carpenter, H. M. S. Forte; Mr. W. V. V. Ledgerwood.

GENTLEMEN: Application having been made to this consulate by George M. Melcher, master of the ship Charles S. Pennell, of Bath, of the burden of 968 tons, for a survey upon the said ship, in consequence of having sustained damages and injuries, you are hereby respectfully requested to repair alongside and on board the said ship, and after a careful examination of her hull, spars, sails, rigging, etc., report to this consulate her present state and condition, and what had best be done for the interest of all parties concerned.

Given under my hand and seal of office, the day and year above written.

[L. S.] (Signed) JAMES MONROE,
U. S. Consul.

No. 3.—*Report.*

Pursuant to accompanying warrant of survey to us directed by the consul of the United States, at this port, Rio de Janeiro, we, the undersigned, proceeded on board the American ship Charles S. Pennell, Melcher, master, of the burden of 968 tons, or thereabouts, bound from New York to San Francisco (which vessel anchored in this port at 9.10 p. m., 5th inst.,) to survey the condition of said vessel, and after a strict and careful examination, beg leave to report as follows:

We found, 1st, ship's shear much altered on both sides, but mostly on starboard side.

246 2d. Many treenails and wedges in same, wood ends of several of her after hoods fashion-pieces, scarfs in rail, butts in waterway and covering boards, and several butts outside, started.

3d. Water-ways strained.

4th. Tried pumps, found 28¾ inches, an hour after found 30½ inches.

5th. Capt. Melcher having reported, and also, as appears per log-book, that the ship had been ashore several hours, on a muddy and rock bottom, we next proceeded to sweep the bottom of the vessel; sweeping from forward aft with current in favor, we could not pass the line further aft than about ten feet abaft the foremast, where the line eventually stuck, and could by no means clear the same.

We therefore recommend that the ship be discharged for further survey.

Rio de Janeiro, 7th day of June, 1864.

To the U. S. consul at Rio de Janeiro.

(Signed) G. H. CHURCH,
Carpenter H. M. S. Forte.
H. W. NEALEY,
Master Ship Eastern Star.
THOS. NEILL,
Am. Ship Edward Hyman.
WM. VAN VLECK LEDGERWOOD,
Agent for New York Underwriters.

And we, the undersigned, do beg further to report, that upon the 9th day of June, 1864, we again proceeded to and on board the American ship Charles S. Pennell, to survey opening of hatches, and found that hatches had been securely and properly fastened, and cargo was, to all appearances, in good condition, and properly stowed.

H. W. NEALEY.
WM. VAN VLECK LEDGERWOOD,
Agent for New York Underwriters.

RIO DE JANEIRO, *9th June*, 1864.

247 No. 4.—*Application.*

RIO JANEIRO, *June 21st*, 1864.

JAMES MONROE, Esq., *U. S. Consul:*

SIR: Part of the cargo of ship Charles S. Pennell, under my command, being now discharged, I have, therefore, respectfully to request that you will please call a second survey on the ship in order to a further examination, and to ascertain the cause and extent of the leak or leaks.

Very respectfully, your obedient servant,
(Signed) G. M. MELCHER,
Master.

No. 5.—*Warrant.*

UNITED STATES CONSULATE,
Rio Janeiro, June 21, 1864.

Capt. Thomas Neill, Am. ship Edward Hyman; Capt. H. W. Nealey, Am. ship Eastern Star; Mr. J. P. Phillips, carpenter U. S. S. Wachusett; Mr. Wm. V. V. Ledgerwood:

GENTLEMEN: Part of the cargo of the ship Charles S. Pennell, un-

der my command, being now discharged, you are hereby respectfully requested to repair on board, and, after a further careful examination of her hull, ascertain, if possible, the cause and extent of the leak, and also her present condition, and what had best be done for the interest of all parties concerned.

Given under my hand and seal of office, the year and date above written.

[L. S.] (Signed) JAMES MONROE,
U. S. Consul.

No. 6.—*Report.*

Pursuant to the accompanying warrant of survey to us directed
248 by the consul of the United States of America, at this port of Rio de Janeiro, to make a second survey of the condition of the American ship Charles S. Pennell, of Bath, Me., Melcher, master, we the undersigned, Thomas Neill, Horace W. Nealey, and Wm. Van Vleck Ledgerwood, on or about the 22d day of June, 1864, proceeded to and on board said ship, and, after a thorough and careful examination, do beg to report as follows:

We found no diminution of leakage of vessel, cargo then being all out between decks, and a portion out of lower hold; ship was straining; vapor condensing under upper deck and dripping down upon lower deck.

We furthermore report that, upon the 9th day of July, 1864, accompanied by James R. Phillips, acting carpenter of U. S. S. Wachusett, we again proceeded on board the Charles S. Pennell, for a full and complete survey.

Sounded pumps at 1.42 p. m.; found 21½ inches of water; water at this time partially covering floor of ship; sounded again at 3.42 p. m., and found 23½ inches of water—laborers at this time working in water and discharging; coal wet.

In between decks found several hanging and lodging knees abaft the mainmast started and gauged, bilge-pumps had been working up and down excessively; mainmast wedges all started. The captain of Charles S. Pennell also reports that the ship struck heavily under the mainmast, causing the mast to jump and switch in her main rigging and back-stays.

In lower hold, we found that every hanging and lodging knee was more or less started and gauged, some of the hanging-knees having gauged to the extent of a quarter of an inch. Also bolts in several hanging-knees started; wedges in thick work of ceiling started in
249 places, some out and some in; breast-hooks forward and aft started, and scarfs in same drawn from one-eighth to three-quarters of an inch. Forward and aft breast-knees started off badly; lodging-knees in partner beams in after hold started; stanchions in after hold have been working under beams, heads of stanchions being chafed, and iron bands of same, started; several through tree-nails on inside, started; scarfs in new middle binding, amidships, badly started and drawn; several beams had been working at their ends; iron pointer, or breast-hooks in after run, drawn; ends of ceiling-plank in after hold have been working and chafing on each other. On further examination outside, we further report:

Ship is now drawing about 13 feet of water. Several butts between load-line and copper started, and copper is so drawn in vicinity of cut-water, as to lead us to suppose that cut-water is started upwards; cop-

per from top line to present water-line, wrinkled, cross-wrinkled, and puffed out, many nails in same broken off; on starboard side, from forward of main rigging to abaft of mizzen rigging copper is worse than elsewhere, being rolled up.

We, therefore, recommend that sufficient coal or other dead weight be retained on board for ballast, in order that ship may be transported with safety, and ship to be docked for further survey, and, after becoming dry in dock, sufficient metal sheathing be removed from her bottom to make a further survey. And we further recommend, that a portion of ceiling on inside be removed as soon as practicable in such parts of ship as may be deemed most likely to exhibit damage to her timbers, should such damage exist. And furthermore, that all breast-hooks and pointers in both ends of ship should be refitted; that forward and after breast-knees under lower deck in lower hold be
250 taken out and replaced—the ship having spread; that all hanging and lodging knees in between decks that are started and gauged, to be thoroughly refastened; all treenails from covering-board to floor heads, to be bored out and replaced with new, of increased size, to render them effective. Also, three-fourths of all copper, metal, and iron fastenings, from covering-board to floor-heads, be backed out, and replaced with new of increased size, to be effective; water-ways in between decks to be rebolted up and down, out and in—bolts to go through, to be about three feet apart, and of seven-eighths inch iron. Where hanging-knees are not started from the beam, that they be thoroughly rebolted, but where they be found to be started from the beam, to be refitted. All lodging-knees to be thoroughly rebolted. Stanchions and knees in partner beams in lower hold to be secured in best possible manner; also, that middle binding be thoroughly refastened.

We can come to no decision upon condition of stem and bottom until the ship be dry in dock, and copper stripped therefrom; and though the ship in dock may be brought to her original lines (her shear being much altered as per first survey), we see no means of retaining them in such condition by thick streaks, bilge keelsons, or otherwise, as the ship is already well supplied with the same.

(Signed) THOMAS NEILL,
Master Am. Ship Edward Hyman.
HORACE W. NEALEY,
Master Am. Ship Eastern Star.
JAMES R. PHILLIPS,
Assistant Carpenter, U. S. S. Wachusett.
WM. VAN VLECK LEDGERWOOD,
Agent for New York Underwriters.

RIO DE JANEIRO, *9th day of July*, 1864.

251 No. 7.—*Application.*

RIO JANEIRO, *July 22d*, 1864.

Hon. JAMES MONROE,
U. S. Consul, Rio Janeiro:

SIR: The ship Charles S. Pennell, under my command, being now in the government dry dock, I have to request that you will please call a survey on said ship in order to ascertain her present condition.

Very respectfully, your ob't servant,
(Signed) G. M. MELCHER, *Master.*

No. 8.—*Warrant.*

UNITED STATES CONSULATE,
Rio Janeiro, July 22, 1864.

Capt. Horace W. Nealey, ship Eastern Star; Capt. H. Bangs, ship Mary Bangs; Mr. Napoleon J. J. Levet, director of constructions navy arsenals; Mr. Wm. V. V. Ledgerwood:

GENTLEMEN: The ship Charles S. Pennell being now in the government dry dock, you are hereby requested to proceed on board and alongside of said ship, and, after a careful examination of her hull, please report to me her present state and condition, and what repairs she requires, in order to be able to proceed on her intended voyage to California.

Given under my hand and seal of office the day and year above written.

[L. S.] (Signed) JAMES MONROE,
U. S. Consul.

No. 9.—*Report.*

Pursuant to the accompanying warrant of survey to us directed by the consul of the United States at this port, to make a further survey of the American ship Charles S. Pennell, we, the undersigned,
252 proceeded to the government dry dock, at Cobras Island, at 2 p. m. of 23d inst., and also in forenoon of 25th inst., and, after having made a strict and careful examination of said ship, do beg to report as follows:

On 23d inst., at 2 p. m., proceeded to dock, and there found American ship Charles S. Pennell in dock, and dry. We found stem and fore-foot started off and upwards, stem somewhat slewed to starboard, and on port side of stem, copper from forefoot to eight feet above is gone, and oakum, more or less, worked out. Lines of ship very bad, bow of vessel dropped bodily. Keel, from foremast to stern, entirely gone; main keel, between fore and main mast, badly split and broken. Under mainmast, it appears that ship, with her whole weight, had been pounding her belt upon a rock for a long time, or had received several blows of immense crushing force, upsetting the fibres of wood of keel, spreading same for a distance of about four feet; here the water was pouring out of seam between garboard and keel.

The copper at seam of keel and garboard is grooved inward and upwards—depth of groove from ¼ to 2 inches. To all appearances the main-keel, keelson, and riders have been crushed or forced upwards bodily, leaving space of about one inch, more or less, between keelson, sister keelson, and floor timbers.

About fifteen feet forward of stern-post, vessel struck heavily, grooving copper inward and upward, starting copper and nails off. Scarf in keel badly started; keel, from foremast aft, has been ground or chafed off from one to three inches.

Except a short distance abreast main hatch about twenty feet, all copper on both sides, fore and aft, is badly wrinkled. On starboard bilge, found a surface of about one hundred square feet of copper
253 entirely gone, planks badly chafed, and, in one place, nearly worn through. The copper on bottom of ship, starboard side, and both sides of keel fore and aft, more or less bruised, torn, and gone.

In lower hold, by wooden gauges or sights placed, 22d inst., while ship was afloat, it appears that keelson, under mainmast, has settled about two inches on the blocks. On starboard side, one plank from

mainmast forward, alongside of sister keelson having been removed, found that floor timbers have worked, some are up and others down. Another plank from abreast to forward of bilge-pumps, alongside of bilge-keelson being removed, shows that timbers there have worked also. On Monday, 25th, again proceeded to dock, found that stem had been calked, also leak under mainmast apparently stopped; and as expense of repairing vessel in dock will be much greater than heaving ship down, we recommend immediate removal of vessel from dock to avoid further expense, which was then carefully done.

(Signed) HORACE W. NEALEY,
Master Am. Ship Eastern Star.
HIRAM J. BANGS,
Master Am. Ship Mary Bangs.
NAPOLEON J. B. LEVET,
Director das Construction Navaes.
WM. VAN VLECK LEDGERWOOD,
Agent for N. Y. Underwriters.

RIO DE JANEIRO, 25*th July*, 1864.

We therefore recommend that copper be stripped off; that the stem be taken out and replaced with a new one; that sufficient ceiling be removed to examine all floor timbers and futtocks, and replaced with new; that all plank be stripped off from outside, from keel to lower deck, and replaced with new; all timbers that may be damaged
254 or broken to be replaced with new; and that the whole keel and keelsons be taken out and replaced with new; ship to be thoroughly fastened, calked, and coppered over felt.

(Signed) H. W. NEALEY,
Master Ship Eastern Star.
H. B. BANGS,
Master Ship Mary Bangs.

RIO DE JANEIRO, *July* 25*th*, 1864.

I therefore recommend that whole keel, fore and aft, comprising keel, main keel, keelson, and sister keelsons, must be entirely removed and replaced with new. Beams that have worked in lower hold, to have fastenings backed out and securely refastened. Planking at starboard bilges to be removed and replaced with new; all bilge treenails to be backed out and replaced with new ones of larger size. The garboard streak to be removed and replaced with new, and diagonally bolted to keelson and sister keelson. Breasthooks and stem to be securely refastened, all planking from bilge to keel to be refastened with new through-bolts, that copper be stripped off, recalked, and recoppered.

(Signed) NAPOLEON J. B. LEVET,
Director das Construccoes Navaes.

RIO DE JANEIRO, 25*th July*, 1864.

Witness to above recommendation—
(Signed) WM. VAN VLECK LEDGERWOOD,
Agent for N. Y. Underwriters.

F.

UNITED STATES' CONSULATE, RIO JANEIRO, BRAZIL.

I, James Munroe, U. S. consul at Rio Janeiro, do hereby certify

255 that the foregoing documents numbered 1, 2, 3, 4, 5, 6, 7, 8, 9, are true and correct copies of the originals on file at this consulate.

Given under my hand and seal of office this 26th day of August, A. D. 1864.

[L. S.] JAMES MONROE,
U. S. Consul.

UNITED STATES CONSULATE, RIO JANEIRO, BRAZIL.

I, James Monroe, U. S. consul at Rio Janeiro, do hereby certify that the annexed advertisement in English and Portuguese, was published in the Journal of Commerce of this city, from the 2d to 4th day of August, 1864, inclusive.

"Sealed proposals will be received at the United States consulate up to 12 o'clock Thursday next, 4th inst., for the furnishing of seventy to seventy-five centos de reis, more or less, to defray the cost of repairs, etc., of the American ship Charles S. Pennell, of Bath, upon the personal credit of the owners of the said ship, whose names can be ascertained by application at the said consulate, or upon bottomry of the said ship, cargo, and freight, from this port to the port of San Francisco, California."

I further certify that no proposals have been received at this consulate from any person or persons to advance the sum required by the ship Charles S. Pennell, for repairs and outfit to enable her to proceed to sea.

Given under my hand and seal of office, this 22d August, 1864.

JAMES MUNROE,
U. S. Consul.

No. 1.

RIO DE JANEIRO,
August 1st, 1864.

WM. VAN VLECK LEDGERWOOD,
Ag't for Underwriters:

SIR: In terms of survey for repairs held on board the Ameri-
256 can ship Charles S. Pennell, Captain Melcher, we, the undersigned, beg to tender for said repairs for the sum of fifty-four centos of reis, 54,000 ff 000.

We have the honor to be, yours, respectfully,
(Signed) J. F. & A. MACLENNAN.

The above tender for repairs received and submitted to surveyors, with estimate of A. Fame, esq., Expert de Veritas, Paris, to give the Charles S. Pennell, same class as before disaster, amounting to sixty-four centos of reis, 64,000 ff 000. And, also, with estimate of repairs of Senhor Napoléao J. B. Levet, director of naval constructions of Brazil, as per his recommendations, amounting to forty-five centos and 315 milreis, 42,315 ff 000.

(Signed) WM. VAN VLECK LEDGERWOOD,
Agent for N. Y. Underwriters.

No. 2.—Condemnation.

Having before us the tender for repairs of the American ship Charles

S. Pennell, made by Messrs. J. F. & A. MacLennan, shipwrights, and estimates of cost of repairs made by Mr. N. J. B. Levet, naval constructor of Brazilian navy, and M. A. Fame, Expert du Veritas Universel, Paris, we, the undersigned, do believe that the cost of repairs, including exchange and maritime interest, would exceed value of ship when so repaired, and that no prudent ship-owner uninsured would think of repairing her.

We therefore recommend that the cargo of vessel be forwarded by other conveyance to its port of destination with all possible dispatch; and we further recommend that ship Charles S. Pennell be condemned and sold, as being unworthy of repairs, for the benefit of all concerned.

H. W. NEALEY,
Master Am. ship Eastern Star.
H. B. BANGS,
Master ship Mary Bangs.

RIO DE JANEIRO, *6th August*, 1864.

257 Witness to above recommendations.
(Signed) WM. V. V. LEDGERWOOD,
Agent for N. Y. Underwriters.

UNITED STATES CONSULATE,
RIO JANEIRO, BRASIL.

I, James Monroe, U. S. Consul at Rio Janeiro, do hereby certify the above and foregoing documents, numbered 1, 2, to be true and correct copy of the originals on file at this consulate.

Given under my hand and seal of office this 30th day of August, 1864.

[L. S.] JAMES MONROE, *U. S. Consul.*

CONSULATE OF THE UNITED STATES,
Port of Rio de Janeiro, June 10th, 1864.

To wit, by this public instrument of declaration and protest, be it known and made manifest unto all to whom these presents shall come, that on the 6th day of June, one thousand eight hundred and sixty-four, before me, James Monroe, consul of the United States of America, for Rio de Janeiro and the dependencies thereof, personally came and appeared G. M. Melcher, master of the ship called the Charles S. Pennell, of Bath, of the burden of 968 tons or thereabouts, then lying in this port of Rio de Janeiro, laden with general cargo, who duly noted and entered with me, the said consul, his protest for the uses and purposes hereafter mentioned; and now on this day, to wit, the day of the date hereof, before me, the said consul, again comes the said G. M. Melcher and requires me to extend this protest, and, together with the said Melcher, also come E. N. Waterhouse,
258 chief officer, B. S. Melcher, third officer, and Abner B. Alexander, carpenter, of and belonging to the said ship, all of whom being by me duly sworn upon the Holy Evangelists of Almighty God, did severally, voluntarily, freely, and solemnly declare, depose, and state as follows, that is to say: That these appearers, on the first day of April, in their capacity aforesaid, sailed in and with the said ship from the port of New York, laden with general cargo, and bound for the port of San Francisco; that the ship was then tight, staunch, and strong; had her cargo well and sufficiently stowed and secured; had her hatches well calked and covered; was well and sufficiently manned,

victualled, and furnished with all things needful and necessary for a vessel in the merchant service, and particularly for the voyage she was about to undertake; and that during the earlier part of the voyage nothing occurred worthy of note in this place.

On the 7th day of May we crossed the Equator in long. 29° 52′ W., with a fine breeze from the southeast. From this time until the 25th of May the winds were continually from a southeasterly direction. On that day, at 3 o'clock p. m., made the land bearing west northwest, the ship heading southwest by south—judge the land to be twenty miles off. At 4 p. m. the ship fetched up in stays; every effort was made to get her off; through the night boats were out sounding; the ship thumping heavily; soundings variable being three, five, seven, and ten fathoms, the best water being to the north; at 7 a. m. began to move; hauled in the fore port braces sharp aback, and the ship went off to the northwest, and finally off the shoal some eighteen miles south of Itacolamis, as placed on chart of the South Atlantic. Pumps carefully attended to. Latitude this day 17° 18′ S., long. 38° 42′ W. We have not yet decided whether we shall be able to proceed on our voyage or not. May 26th. Find the ship makes a great deal of
159 water; takes one-third of the time to keep her free; pumps throw up a great deal of muddy water. From this time until May 29th ship leaking badly; takes about one-half of the time to pump ship; decided this day to put into Rio de Janeiro for repairs; ship continued to leak badly until June 5th, when we came to anchor in the harbor of Rio de Janeiro. Throughout the voyage the pumps were carefully attended to, and sail was made and shortened as the exigencies of the weather and the safety of the ship and cargo demanded.

And further deponents say that after the ship arrived in harbor, and while discharging cargo, she continued to leak very badly, making nearly as much water as when at sea.

Further deponents say not.

(Signed) G. M. MELCHER, *Captain.*
E. N. WATERHOUSE, *1st Officer.*
B. S. MELCHER, *3d Officer.*
A. P. ALEXANDER, *Carpenter.*

And these said appearers, upon their oaths aforesaid, do further declare and say, that during the said voyage they, together with the others of the ship's company, used their utmost endeavors to preserve the said ship and cargo from all manner of loss, damage, or injury; wherefore the said G. M. Melcher, master, hath protested, as by these presents, I, the said consul, at his special instance and request, do publicly and solemnly protest against all and every person or persons whom it doth or may concern, and against the winds and waves and billows of the seas, and against all and every accident, matter, and thing had and met with as aforesaid, whereby and by reason whereof the said ship or cargo already has or hereafter shall appear to have suffered or sustained damage or injury. And do declare that all losses, damages, costs, charges, and expenses that have happened to the said ship or
260 cargo, or to either, are and ought to be borne by those to whom the same by right may appertain by way of average or otherwise, the same having occurred as before mentioned, and not by or through the insufficiency of the said ship, her tackle, or apparel, or default or neglect of this appearer, his officers, or any of his mariners.

Thus done and protested in the port of Rio de Janeiro, this 10th day

of June, in the year of our Lord one thousand eight hundred and sixty-four.

In testimony whereof these appearers have hereunto subscribed their names; and I, the said consul, have granted to the said master this public instrument, under my hand and the seal of this consulate, to serve and avail him and all others whom it doth or may concern, as need and occasion may require.

[L. S.] (Signed) JAMES MONROE,
U. S. Consul.

U. S. CONSULATE,
Rio de Janeiro, July 28, 1864.

I, James Monroe, consul of the United States for Rio de Janeiro and the dependencies thereof, hereby certify the foregoing to be a true and correct copy of the original protest recorded in the books of this office.

Given under my hand and seal of office, the day and year aforesaid.

[L. S.] (Signed) JAMES MONROE,
U. S. Consul.

U. S. CONSULATE, RIO JANEIRO, BRAZIL.

I, James Monroe, U. S. consul at Rio Janeiro, do hereby certify that the annexed advertisement, in English and Portuguese, was published in the Journal of Commerce of this city, on the 9th, 10th, and 11th days of August, 1864.

261 *Sale by auction of the American ship Charles S. Pennell, of* 968 *tons register.*

M. S. Pinto, formerly S. Southam, will sell at public auction on Tuesday, 11th inst., at 12 o'clock precisely, the fine, fast sailing American ship Charles S. Pennell, of 968 tons register, coppered and copper fastened, with her masts, sails, standing and running rigging, spars, anchors, and chains, stores and provisions, boats, etc.

The ship is anchored off the ilha das Enxadas, and can be inspected at once, and will have the American flag hoisted at the fore.

The sale will take place on board, in presence of the American consul, and for account of all concerned.

I further certify that agreeably to said advertisement, the ship Chas. S. Pennell was duly sold at public auction by M. S. Pinto, licensed auctioneer.

Given under my hand and seal of office this 22d of August, 1864.

[L. S.] (Signed) JAMES MONROE,
U. S. Consul.

UNITED STATES CONSULATE, RIO JANEIRO.

I, James Monroe, U. S. consul at Rio Janeiro, do hereby certify that the annexed advertisement in English, was published in the Journal of Commerce of this city on the 10th, 11th, and 12th days of August, 1864.

"Sealed proposals will be received at the United States consulate up to twelve o'clock of Friday next, 12th inst., for a vessel or vessels to carry the cargo of the American ship Charles S. Pennell, condemned
262 at this port on her voyage from New York to San Francisco, California. The cargo consists of coal and general merchandise,

and can be examined at the Island of Enxada. Conditions may be learned at the above consulate."

I further certify that the tender of the American ship Sir John Franklin, and English bark Knight, were the lowest received at this consulate.

Given under my hand and seal of office this 22d day of August, A. D. 1864.

[L. S.] (Signed) JAMES MONROE,
U. S. Consul.

UNITED STATES CONSULATE, RIO JANEIRO.

I, James Monroe, U. S. consul at Rio Janeiro, do hereby certify that the annexed advertisement, in English and Portuguese, was published at this city in the Journal of Commerce, on the 1st, 2d, and 3d days of October, 1864.

"Sealed proposals will be received at the United States consulate, up to 12 o'clock m., of Monday next, 3d October, for the furnishing of R s. 13,000$ @ 15,000$, more or less, to defray the expenses on cargo landed ex the American ship Charles S. Pennell, condemned at this port on her voyage from New York to San Francisco, California, upon bottomry of said cargo, shipped per English bark Knight, and American ship Sir John Franklin."

I further certify that only one tender was received at this consulate, the same being from Maxwell, Wright & Co., of this city, and was accepted.

Given under my hand and seal of office the 4th day of October, A. D. 1864.

JAMES MONROE,
U. S. Consul.

263 RIO DE JANEIRO, *3d October*, 1864.

To JAMES MONROE, Esq.,
Consul for the United States of America, present:

SIR: We beg to make the following tender upon the cargo of the American ship Charles S. Pennell, from New York, and which is being reshipped, and to be carried on to California (port of San Francisco) by the American ship Sir John Franklin and British bark Knight for the sum of fifteen thousand milreis 15,000 ff 000 Brazilian currency (more or less) against expenses incurred in this port by said ship and cargo, namely:

The principal of the bond to be calculated at the sterling exchange of 28*d*. (twenty-eight pence to the milreis), 39 (thirty-nine) per cent. Maritime interest to be charged if the bond be paid in New York within 5 (five) days after its presentation there; 95 (ninety-five) per cent. to be charged upon said bond if paid in San Francisco, California.

The bond, with maritime interest, to be paid (in New York or San Francisco, as the case may be), at the rate of sight sterling exchange on London.

And the bond is taken for account "whom it may concern."

We are your most obedient servants,
(Signed) MAXWELL, WRIGHT & CO.

UNITED STATES CONSULATE, RIO JANEIRO, BRAZIL.

I, James Monroe, U. S. consul at Rio Janeiro, do hereby certify the

foregoing to be a true and correct copy of the original on file at this consulate.

Given under my hand and seal of office this fifth day of October, A. D. 1864.

JAMES MONROE,
U. S. Consul.

264 *Deposition of Thomas Pennell.*

I, Thomas Pennell, of Portland, on oath depose and say, in answer to the following interrogatories, as follows, to wit:

Int. 1. State your age, residence, and occupation, and how long you have been a ship-master.

A. My age is 48 years; reside in Portland; have been a ship-master for 22 years.

Int. 2. State whether or not you have made voyages round Cape Horn from New York and Europe; and, if yea, how many; and what acquaintance have you with the usual route made by navigators in making the voyage from New York round by Cape Horn to San Francisco?

A. I have sailed around Cape Horn three times, from New York to Valparaizo. Usual voyage is to follow up the coast of Brazil. The same route would be taken to San Francisco as to Valparaizo, or Callao, or Rio, or Montevideo, as far as the coast of Brazil is concerned.

Int. 3. In going from New York to San Francisco, at what longitude do you cross the equator?

A. From (28) twenty-eight to (32) thirty-two west longitude.

Int. 4. Why is there so great a variation in this?

A. Owing to the winds.

Int. 5. In sailing from New York to San Francisco, is there any well-settled route pursued by navigators along the Brazilian coast?

A. There is none.

Int. 6. How near, in this voyage, do you keep to the coast of Brazil?

A. From one mile to one hundred and fifty.

265 Int. 7. In making this voyage, what is the usual practice of navigators as to distance in sailing along the Brazilian coast?

A. The usual practice is to run near the shore.

Int. 8. Why do navigators do this?

A. Because the wind does not admit of going further off.

Int. 9. Whether or not in running up this coast the winds are exceedingly variable?

A. They are.

Int. 10. Whether or not you run in so near the shore as you can to take advantage of land breezes?

A. We run in as near as we can before tacking in all cases.

Int. 11. Is it unusual for navigators to run in as near as twenty miles of the Brazilian coast?

A. It is not unusual for them to go within five miles.

Int. 12. Is it unusual for navigators in making a voyage from New York to San Francisco round the Horn, to cross the equator in longitude twenty-nine (29°) degrees west?

A. It is considered a very fine place—that is my experience—considered by navigators a safe place between twenty-nine and thirty-two.

Int. 13. Are you acquainted with the Abrolhos shoals off the coast of Brazil?

A. I am.

Int. 14. How far from the coast do they lie?

A. I cannot tell exactly without a measurement; I should think from eighteen to twenty miles from the main land.

(Mr. Rand objects to the latter clause of the last answer.)

Int. 15. Please describe the appearance of the shoals and the channel between the shoals, known as the Abrolhos channel?

266 A. I have never passed through the channel—always passed them on the outside. There is a channel there nine miles wide; I know this only from what is laid down on the charts, and from what other navigators have told me.

(Mr. Rand objects to the last answer.)

Int. 16. Will you state if you know whether there are currents near the Abrolhos shoals, north and south?

A. There are currents which vary from nothing to three miles per hour in velocity with the winds.

Int. 17. Please state the effects of these currents upon vessels navigating the waters near the Abrolhos shoals?

A. Have seen them setting from west-south-west to south-south-east; it makes the navigation of the vessel very uncertain. It may set a vessel out of its course thirty miles in twenty-four hours.

Int. 18. If a navigator cross the equator at longitude 29° 32′ west, with continuous southeasterly winds, describe the manner of sailing up the Brazilian coast?

A. He would steer up southwest by south in a square rigged vessel with yards. If he found that was setting him in shore, he would haul south-southwest by the wind. He would tack according to the circumstances of the wind—would run in from one mile to five from the coast; then tack off with as short a run as possible, and tacking in and out run up the coast near the shore.

Int. 19. As he approached the Abrolhos shoals with the winds southeast, running in towards the shore, what would he do?

A. He would tack ship and stand off and would head east-northeast. If he was not down to the shoals he would not stand out; if he was down to the shoals he would stand out and run by.

Int. 20. In a passage from New York to San Francisco, would it be any deviation from the usual route pursued by navigators for a
267 master to run his vessel within twenty miles of the shore near the Abrolhos shoals?

A. It would not; it would be right in the track. We always go within twenty miles of the shore, and near the shoals, when the wind permits.

Int. 21. How near to the Abrolhos shoals have you ever run?

A. I have run within ten miles of them.

Int. 22. Have you the course of your last voyage along the Brazilian coast upon your chart? If yea, will you produce it and make it a part of your examination?

(Defendant objects to the question and to the charts, and any of witness's voyages as marked thereon.)

A. I have that course (and witness produces charts marked A and B), the pencil marks along the Brazilian coast marks the course made by me in said voyage, and is the usual voyage made by navigators in sailing from New York to San Francisco.

THOMAS PENNELL.

Deposition of George M. Melcher.

Int. 1. State your name, residence, and occupation.

A. George M. Melcher; Brunswick, Maine; shipmaster.

Int. 2. What insurance, if any, did you ever have upon the guano charter-party, dated New York, Jan. 30, 1864. and entered into between yourself and A. J. Schön & Co., J. D. Mutzenbecher Sons, merchants, and agents of Henry Witt & Schutte, for the carriage of a cargo of guano from Chincha Islands to Hamburg or Rotterdam, beside the policy issued by the Ocean Insurance Company, numbered 24580, and dated 23d of March, 1864, and now in suit in case No. 93, on the docket of supreme judicial court for Cumberland County, April term, 1870?

A. None, whatever.

268 Int. 3. Did you have at any time any insurance on said charter party in the Columbian Insurance Company of New York City?

A. None.

Int. 4. Did you ever authorize any person, directly or indirectly, to effect for you, or in your interest, or for your benefit, any insurance upon said charter-party other than the insurance of the 23d of March, 1864, issued by the Ocean Insurance Company, and above inquired of?

A. Never; I never did.

Int. 5. Did you ever effect or authorize any person to effect for you, directly or indirectly, any insurance on any freight on board the ship Charles S. Pennell, or on any freight not on board the ship Charles S. Pennell, on any voyage from New York to San Francisco, or on any voyage from New York to San Francisco, and thence to the Chinchas, and thence to Hamburg or Rotterdam?

A. I did not.

Int. 6. When and where was the first that you ever heard anything about insurance in the Columbian office on account of freight of ship Charles S. Pennell?

A. July, 1865, at the office of The Sun Mutual *office* in New York City.

Int. 7. Did you make inquiry at the Columbian Insurance office to ascertain whether any policy was issued on account of any freight of the ship Charles S. Pennell, and did you find any such insurance?

A. I did not make such inquiry. I went to the Columbian Insurance office with George W. Kendall. I never found any such insurance.

Int. 8. Did you receive from the Columbian Insurance Company the name of any person or persons as having effected any insurance on account of freight of ship Charles S. Pennell.

269 A. I did not.

Int. 9. Did you ever authorize any person to sign any premium note, or pay any premium, or make application in any way for any insurance upon freight upon board the ship Charles S. Pennell, or on charter-party above stated, for the voyages above named, in the Columbian Insurance Company of New York?

A. I never did.

Int. 10. Have you ever been able to find any person who did make any such application or effect any such insurance?

A. I never have.

Int. 11. If any such insurance has been made without your authority have you ever ratified it in any way?

A. I never have.

Int. 12. Have you ever paid or authorized any person for you to pay any premium upon any policy on freight as above stated?

A. I never have.

Int. 13. Did you ever cancel any policy on any freight in the Columbian Insurance Company, or authorize any person to cancel it for you?

A. I never did.

Int. 14. Did you ever receive any return premium upon such policy, or authorize any person to receive any such return premium for you?

A. I never did.

Int. 15. Have you a brother; and, if so, what are his initials?

A. I have; his name is B. M. Melcher; my name is G. M. Melcher.

Int. 16. Whether or not he was an owner in the ship Charles S. Pennell in 1864?

A. He owned one-eighth at that time.

270 Int. 17. Were you the plaintiff in a suit in the supreme judicial court for Cumberland County for the April term, 1870, upon a policy dated March 23, 1864, upon the hull of the ship Charles S. Pennell, against the Ocean Insurance Company, the policy being for three thousand dollars?

A. I was.

Int. 18. Was that suit litigated and finally settled by Ocean Insurance Company?

A. It was.

Int. 19. In that settlement were all matters of general average and special charge, and all subjects of adjustment between the Ocean Insurance Company and yourself, on account of the loss of the ship Charles S. Pennell, her sale in Rio Janeiro, and any salvage arising therefrom settled and deducted from the amount due upon said policy?

A. They were.

G. M. MELCHER.

P.

Application of A. Sawyer for insurance, put in by defendant.

I wish for Geo. M. Melcher $6,550 on charter, and $2,650 on primage, and $1,500 on property on board ship Charles S. Pennell, at and from New York to San Francisco, including war risk.

(Signed) ANDREW S. SAWYER.

MARCH 23, 1864.

(Copied from Ocean Insurance Co.'s book.)

271 EXHIBIT No. 20.

Supreme judicial court, western district. July term, 1872.

GEORGE M. MELCHER
vs.
OCEAN INSURANCE COMPANY.

J. & E. M. Rand, for defendant.

In February, 1864, ship C. S. Pennell is at New York; there obtains a charter from New York to San Francisco.

And also while at New York obtains a charter for a cargo of guano from Chincha Islands to Europe.

Latter charter declared that ship shall sail on or before June 1, to San Francisco, and thence to Callao and Chinchas, p. 64.

A stipulation, or even permission, that a ship go 3,000 miles out of her way, is unusual. But this ship had already taken a charter for San Francisco and is permitted to execute it before going to Callao, or even sailing for that port.

Having obtained these two charters plaintiff takes out two policies of insurance—one of which is sued in this action—by which defendants insure "on charter, primage, &c., at and from New York to San Francisco."

Ship loads with a full cargo for San Francisco, sails, and is lost between New York and San Francisco. Pages 2, 10, 20, 24, 25.

First question is what charter covered by this policy. Plaint-
272 iff says it is not the one from New York to San Francisco, but that from Chinchas to Europe. And this court say that parol evidence admissible to show what charter insured by this policy.

And plaintiff introduces evidence showing, as he says, that this policy covers, and was intended to cover, the guano charter.

Court will decide, from the evidence, which charter is covered.

If that from New York to San Francisco, plaintiff can recover any surplus not covered by the prior policy.

If court say policy was intended to cover guano charter from Chinchas to Europe, then we say that we are not liable, because policy never attached.

Remarkable provision in charter that ship go first to San Francisco, 3,000 miles beyond Callao, and then return there. And, upon plaintiff's construction of policy, the insurance is of a remarkable and unusual character; insures from New York to San Francisco, freight from Chinchas to Europe, does not cover any portion of the time, or any portion of the voyage in which the freight is to be actually earned.

We say policy never attached, because ship never sailed upon the guano voyage—never sailed upon it, even in the most liberal legal sense—never sailed an inch for the purpose of earning the guano freight—never sailed under the guano charter actually or legally.

A ship lying at A may be chartered for a voyage from B to C—the freight from B to C may be insured—and if vessel sails from A for B for the sole purpose of earning the freight from B to C, policy attaches; and if ship be lost before arriving at B, the insurers are liable on policy.

This is a well-settled principle, and we presume that plaintiff claims to recover upon it.

273 We admit the principle, but deny that this case falls within it.

The principle is laid down; and the cases establishing it are all cited in—

1 Parsons' Insur., 169, &c., &c.

1 Phillips' Insur., § 335 (p. 178, 5th ed).

Barber v. Flemming, Law Rep. 5 Q. B., 59.

The ship must start for the sole purpose of performing that voyage and earning that freight; not for the purpose of performing a different voyage and earning a different freight.

Such are all the cases.

But here ship sailed from New York for San Francisc' under a charter for San Francisco—to carry a cargo there, and to earn the freight upon it—had a full cargo for San Francisco—no other purpose.

After her arrival at San Francisco she had a further object; but while on her way to San Francisco, her sole purpose in pursuing that route was to execute her San Francisco charter, and to deliver an independent cargo there.

A ship cannot sail under and in the execution of two charters at the same time any more than she can sail upon two voyages at the same time. One charter may follow another between foreign ports, and one voyage may follow another between foreign ports, but no ship can be in the process of executing more than one at the same time.

Plaintiff says that his other policy was on the freight from New York to San Francisco. He has probably received the amount due on that.

And can any case be found where one recovered under the same casualty upon two different policies upon two different charters?

274 I have found no case in which a claim like this, under such a state of facts, has ever been set up. And I know no principle to sustain it.

Whether sale of ship was justifiable so as as to make a total loss, we submit to court upon the evidence.

Walker v. Protection Co, 29 Me., 317.
Pierce v. Ocean Co., 18 Pick., 83.
Prince v. Ocean Co., 40 Me., 481.
Stephenson v. Piscat. Co., 54 Me., 55.

If court should think plaintiff entitled to recover, case must be sent back to nisi prius, as this is not a valued policy, and amount depends upon further evidence—and two trustee processes pending.

EXHIBIT No. 21.

OFFICE OF THE SUN MUTUAL INSURANCE COMPANY,
No. 52 WALL STREET,
New York, January 29th, 1872.

Messrs. J. & E. M. RAND,
Portland, Maine:

GENTLEMEN: Yours of 16th inst. came duly to hand.

We have submitted the case of the C. S. Pennell to our counsel, Mr. Charles E. Butler, and we now send you a copy of his opinion, by which you will see that if the effect of the admission of the evidence of the plaintiff in the suit against the Ocean Insurance Company will be to hold them liable on a risk different from that described and reinsured under our policy to them, we, not being reinsurers of such risk, of course have no interest.

Very respectfully yours,

J. P. PAULISON,
President.

275 EXHIBIT No. 21 A.

Case of the Charles S. Pennell.

I have examined the papers in this case, and

1. I think it ought to be more distinctly proved than it appears to have been, that the ship sailed from New York loaded with a general cargo, under a charter, from thence to San Francisco, and that Melcher's interest under that charter was fully covered by previous insurances.

2. In my opinion Melcher had no insurable interest under the guano charter until the ship arrived at San Francisco. The performance of that charter was to begin at San Francisco, and could not begin before, for the reason that until her arrival at that port, she was fully employed

in another service, previously undertaken. For the same reason it cannot, I think, be said that she "broke ground" upon the voyage under that charter when she left New York for San Francisco. Her previous charter determined her voyage to be between those two ports, and it seems to me impossible that she either could perform, or could be considered as performing, two voyages at the same time. Suppose the second charter, made as the guano charter, was at New York before sailing from that port, had been for a return voyage from San Francisco to New York, could it, with any propriety, be claimed that the ship "broke ground" upon the return voyage, when she left New York to go to San Francisco? Or that there would be any insurable interest under such a charter until her arrival at the latter port? Or that an insurance from New York to San Francisco was applicable to the return voyage? I imagine not; and yet the case supposed would not differ in any essential respect from the case as it stands.

3. But however that question may be ultimately decided under the ruling that has been made, to admit extrinsic evidence as to which charter the insurance was to be applied, there can, I think, be no doubt that The Sun Mutual Insurance Company's liability under the
276 reinsurance policy cannot be extended beyond the obvious import of the terms in which it was expressed. The letter of Melcher, ordering the insurance, not having been exhibited to them, nor the explanations of Sawyer made to them, they cannot be affected by them; and hence, if the admission of extrinsic evidence as to what took place between Sawyer and the Ocean Company when the original insurance was made varies the case as between that company and Melcher from what it appears to be on the face of the reinsurance policy I cannot see that that is a matter which concerns The Sun Company. What that company insured, as appears by the Ocean Company's application, was—

"$6,550 on charter, $2,650 on primage, $1,500 on property on board ship Charles S. Pennell, at and from New York to San Francisco, including war risk," and if the charter and primage for that voyage was covered by previous insurances (the property insured is not claimed to have been lost) there is an end, as it seems to me, of The Sun Company's liability under the policy made by them.

CHARLES E. BUTLER.

NEW YORK, *January 29th*, 1872.

EXHIBIT No. 22.

PORTLAND, *February* 5, 1872.

J. P. PAULISON, Esq.,
President:

DEAR SIR: We have your favor of the 29th ult.

In the C. S. Pennell case all tenable points that are advantageous to defendants will be duly presented in defense, and we yet trust that the company will not be held liable.

We perceive nothing new in Mr. Butler's opinion.

Very respectfully yours,

J. & E. M. RAND.

277 EXHIBIT No. 23.

PORTLAND, *July* 12, 1872.

J. P. PAULISON, Esq., *President:*

DEAR SIR: By the same mail herewith we forward to your company

a printed copy of a report of case of G. M. Melcher. The cause comes up for argument this month before the full bench.

At the time the writer had the pleasure of conferring with you, in Nov., '69, respecting this case, you observed that any funds called for on acc't fees and disbursements would be furnished at any time. I would accordingly ask if we may draw on you at sight for five hundred dollars on acc't in the above-named suit.

Very respectfully, your obedient servants,

J. & E. M. RAND.

EXHIBIT No. 24.

OFFICE OF THE SUN MUTUAL INSURANCE COMPANY,
New York, July 15, 1872.

Messrs. J. & E. M. RAND,
Portland, Maine:

GENTLEMEN: We have yours of the 12th inst., with the printed copy of report of case of G. M. Melcher vs. Ocean Insurance Company accompanying it, and take note that the cause comes up for argument this month before the full bench. We also note your remark "that at the time you had the pleasure of conferring with us in Nov., '69, respecting this case, we observed that any funds called for on account of fees and disbursements would be furnished at any time, and that you would accordingly ask if you might draw us at sight for five hundred dollars on account above-named suit." In reply to which I beg to say that I do not remember of any such promise, although I did, at your request, make an order at that time for $100, not then fully understanding our true position in the matter in the case as subsequently developed. We have therefore to say that, as the suit is against the Ocean Company and not against us, you must look to them for your fees. For
278 explanation, we have now to refer you to our letter of October 15, 1870, and January 29, 1872, and also to the opinion of our counsel, Mr. Chas. E. Butler, sent you with the latter.

We telegraphed you to-day as follows: Do not draw; will write to-day.

Respectfully yours,

J. P. PAULISON,
President.

EXHIBIT No. 25.

PORTLAND, *July* 16, 1872.

J. P. PAULISON, Esq., *President:*

SIR: We have your letter of yesterday, and are much surprised at its remarkable contents.

You probably are not aware that The Sun Mutual reinsured Ocean Company, or, more probably, are inclined to deny it.

But if this case goes against Ocean Company, you will be confronted with evidence amply sufficient to make you pay the amount recovered by Melcher, and also all costs and expenses of every kind.

Yours respectfully,

JOHN RAND.

EXHIBIT No. 26.

PORTLAND, *December* 23, 1872.

J. P. PAULISON, Esq., *President:*

DEAR SIR: The supreme court of this State has at length decided the case of Melcher vs. Ocean Insurance Company, rendering judgment in favor of Melcher for $9,200 and interest from April 28, 1865.

As your office reinsured The Ocean Company, and this judgment (whether legally correct or not) is conclusive, will you please advise me what evidence you will wish as to the amount due, and when you will be prepared to adjust the same?

Very respectfully, your obedient servants,

J. & E. M. RAND.

279 EXHIBIT No. 27.

OFFICE OF THE SUN MUTUAL INSURANCE COMPANY,
No. 52 Wall Street, New York, January 24, 1873.

Messers. J. & E. M. RAND,
Portland, Maine:

GENTLEMEN: We are in receipt of yours of 23d ultimo. As we do not admit the liability of this company to The Ocean Company for the judgment received by Melcher against it. we shall require proof of such liability under our policy. In fact, we deny such liability. We deny that we reinsured The Ocean Company on a risk different from that described in our policy, and if they have been held liable on a different risk, we deny our liability. If you will send us a report of the trial in which judgment was obtained, containing the evidence, pleadings, and decisions of the court, we will examine it in order to see precisely what Melcher's claim on The Ocean Insurance Company was, and after submitting it to our counsel, write you again on this subject.

Respectfully, yours,

(Signed) J. P. PAULISON, *President.*

EXHIBIT No. 28.

PORTLAND, *January* 30, 1873.

J. P. PAULISON, Esq., *President:*

DEAR SIR: We have your favor of 24th inst.

We shall be pleased to lay before your company and its counsel all the papers in the Melcher case, and will do so personally at an early day, to be fixed upon between us, probably latter part of next week.

Very respectfully, yours,

J. & E. M. RAND.

280 EXHIBIT No. 29.

No. 24500.

By The Ocean Insurance Company.

[Stamp.]

This policy of insurance witnesseth that the president and directors of The Ocean Insurance Company do, by the' presents, cause C. S. Pennell, for account whom it concerns, loss, if any, payable to C. S. P., to be insured, lost or not lost, eight thousand dollars, as against war risk only on vessel, and eight thousand dollars marine risk only on charter

of ship Charles S. Pennell, at and from New York, to, at, and from San Francisco and Callao to Chinchas.

If on a passage at the end of the term, the risk to continue at pro rata premium until twenty-four hours after arrival at port of destination, and no longer, either on hull or freight. Prohibited from carrying grain in bulk, from carrying passengers on more than one deck, and from being engaged in the coolie trade.

In case of loss under the continuation clause, three months' additional premium is warranted by the assured, any clause in this policy to the contrary notwithstanding, whereof is master for the present voyage, or whoever else shall be master in the said vessel, or by whatsoever other name or names the said vessel, or master thereof, is or shall be named or called, beginning the adventure upon the said as aforesaid, and to continue during the voyage aforesaid on the vessel until she shall be arrived and moored at anchor twenty-four hours in safety, and on the property until landed.

And it shall be lawful for the said vessel, in her voyage, to proceed and sail to, touch, and stay at any ports or places, if thereunto obliged by stress of weather or other unavoidable accidents, without prejudice to this insurance.

Touching the adventures and perils which the said insurance company are contented to bear and take upon them in this voyage,
281 they are of the seas, fire, barratry of the master (unless the insured be owner of the vessel) and of mariners, and all other losses and misfortunes which have or shall come to the damage of the said or any part thereof, to which insurers are liable by the rules and customs of insurance in Portland, excepting such losses and misfortunes as are referred to by clauses in the margin of this policy; provided that the insurers shall not be liable for any partial loss on hemp and flax, unless the loss amount to twenty per cent. on the whole aggregate value of such articles; nor for any partial loss on saltpetre, gunny cloth, gunny bags, twine, jute, and East India hemp and skins, unless the loss amount to ten per cent. on the whole aggregate value of such articles; and for any partial loss on sugar, flaxseed, bread, tobacco and rice, unless the loss amount to seven per cent. on the whole aggregate value of such articles; nor for any partial loss on salt, grain, fish, fruits, hides, skins, ice, or other goods that are esteemed perishable in their own nature, unless it amount to seven per cent. on the whole aggregate value of such articles, and happen by stranding; nor for leakage of oil, unless it be occasioned by stranding or collision with another vessel; nor for any partial loss on other goods, or on the vessel or freight unless it amount to five per cent. exclusive in each case of all charges and expenses incurred for the purpose of ascertaining and proving the loss; but the owners of such goods shall recover on a general average. It is also agreed that the insurers shall not be liable for partial loss or damage to bar, bundle, rod, hoop, plate and sheet iron, wire of all kinds, tin plates, steel, cassia in mats, linseed in pockets, and goods stowed loose. It is further agreed that the insurer shall not be liable for damage or injury to goods by dampness, rust, change of flavor, or by being spotted, discolored, or moldy, unless the same be caused by actual contact of sea-water with the articles damaged, occasioned by sea perils. And that the
282 company shall not be liable for loss or damage by wet or exposure to the elements of goods insured as on deck; nor for any other loss on the same unless it amount to twenty per cent. and then for the excess above fifteen per cent. only. In case of damage by perils of the sea to dry goods, cutlery or other hardware, the loss shall be as-

certained by a separation and sale of the portion only of the contents of the packages so damaged and not otherwise, and the same practice shall obtain as to all other merchandize as far as practicable. And in case of any loss or misfortune, it shall be lawful for the insured, factors, servants, and assigns, to sue, labor, and travel for, in, and about the defence, safeguard, and recovery of the said or any part thereof, without prejudice to this insurance; to the charges whereof the said insurance company will contribute, in proportion as the sum insured is to the whole sum at risk. And so the president and directors aforesaid are contented, and do hereby bind the capital stock and other common property of the said insurance company, to the insured, executors, administrators and assigns, for the true performance of the premises, confessing themselves paid the consideration due unto them for this insurance, by the insured, at and after the rate of two per cent. for war risk on vessel and three per cent. marine risk on charter.

Sum insured $16,000.

Vessel valued at $40,000, prem'm included.

To add for each passage, viz, one per cent. if loaded with more than registered tonnage of guano, coal, salt, nitrate of soda, iron, copper, ore or slate either or in any combination; or with more than one-fourth of the registered tonnage of marble. One-half per cent. if loaded with cargo of rice or teak wood. Also to add one per cent. for each time in the North Sea between Oct. 1 and March 1, or the Black Sea between May 1 and Sept. 1, and Bay of Fundy between July 1 and Sept. 15, and between Nov. 15 and April 1, and river and gulf of St. Lawrence between August 1 and October 1.

Charter valued at $8,000 prem'm included.

283 Prohibited from the river and gulf of St. Lawrence and Black Sea between October 1 and May 1. Also, from loading more than three-fourths registered tonnage of marble. One per cent. to add for each passage to or from Mexico or Central America. And one-half per cent. to add for each passage traversing West Indian latitudes between July 15th and Oct. 15th.

Property val'd at $ prem'm included.

And it is hereby agreed that if the insured shall have made any other insurance upon the aforesaid, prior in date to this policy, then the said insurance co. shall be answerable only for so much as the amount of such prior insurance may be deficient toward fully covering the property in risk, whether for the whole voyage or from one port of lading or discharge to another; and the said insurance company shall return the premium, or a ratable part thereof, upon so much of the sum by them insured, or for such part of the voyage as they shall be exonerated from by such prior insurance; excepting half per cent., which shall be retained in all cases of returned premium, shall be made for any passage whereon the risk has once commenced. And in cases of any insurance upon the said , whether it be for the whole or part of the voyage, subsequent in date to this policy, the said insurance company shall nevertheless be answerable to the full extent of the sum by them herein insured without right to claim contribution from such subsequent insurers; and shall accordingly be entitled to retain the premium by them received, in the same manner as if no subsequent insurance had been made. And in case of loss, such loss shall be paid in sixty days after proof and adjustment thereof, the amount of the premium note without discount, if unpaid, and all sums due to the company from the insured when such loss becomes due, being first deducted, and all sums becoming due being first paid or secured to the satisfaction of the said president and directors,

Premium, $400 00
Policy, 25
$400 25

284 they discounting interest for anticipating payment on notes not due. It is also agreed that in case of capture or detention, the in-

sured shall not have the right to abandon therefor, until proof is exhibited of condemnation, or of the continuance of the detention (by capture or other arrest) for at least ninety days; and that the insured shall not abandon in consequence of the port of destination being blockaded, but the vessel shall in such case have liberty to proceed to another safe port not blockaded, and there end the voyage, or wait a reasonable time for the blockade of the original port of destination to be raised. It is agreed that the insurers, without its being considered a waiver or acceptance of abandonment, may, after a disaster, take possession of and repair the property insured; and that the acts of the insured or insurers in recovering, saving, and preserving the property insured in case of disaster shall not be considered a waiver or acceptance of abandonment. Warranted by the assured, free from any loss or expense by capture, seizure, restraint, blockade, condemnation, plunder, waste, or destruction by any person or persons, or by or consequent upon the acts of any power or assumed power, or under the authority of any State or confederacy of States now or heretofore included within the United States; and also from any loss whatever occurring while under detention or restraint, any stipulations in this policy to the contrary notwithstanding.

It is especially agreed that instead of deducting one-third for new on the article of copper or other sheathing, there shall be deducted two and a half per cent. of the cost of recoppering after deducting the value of the old copper and nails, for each and every month the copper shall have been on the vessel at the time of recoppering; and if the copper shall have been on forty months, the cost of recoppering shall be wholly borne by the assured.

It is also agreed that the insurers shall not be answerable for any charge, damage, or loss which may arise in consequence of seizure or detention, for or on account of illicit or prohibited trade, or trade in articles contraband of war on board, or as to the fact of an attempt to trade in violation of the laws of nations. It is also agreed that this policy shall be void in case of its being assigned, transferred, or pledged without the previous consent in writing of the insurers. It is also agreed that the insured shall not have the right to abandon the vessel for the amount of damage merely unless the
285 amount which the insurers would be liable to pay under an adjustment, as of a partial loss, shall exceed half the amount insured; and in case of a total loss of the vessel, with salvage, the amount allowed out of the salvage, to the officers and crew for wages earned or services rendered previously to the loss, shall be considered as so much of the salvage applied to the use of the ship-owners, even although the same should be allowed or paid under the name of salvage, and not as wages, and shall accordingly be deducted in adjusting the loss. It is agreed that if any dispute shall arise relating to a loss on this policy, it shall be submitted to the judgment and determination of arbitrators mutually chosen whose award in writing shall be conclusive and binding on all parties. It is further agreed that the usual leakage and difference of gauge of molasses from any foreign port, or port in Louisiana or Texas, is eighteen per cent., and that the company is not liable for any loss thereon unless amounting to at least twenty-five per cent. net. If there shall be any lime on board, on cargo, or on freight, fifty per cent. to be added to the premium for the passage. The company is not liable for wages or provisions, except in general average, when customary at port of destination.

In witness whereof the president of the said Ocean Insurance Company hath hereunto subscribed his name and caused the same to be countersigned by their secretary, at their office in Portland, this twenty-fifth day of February, one thousand eight hundred and sixty-four.

(Signed) WM. W. WOODBURY,
President.

GEO. A. WRIGHT, *Secretary.*

286 EXHIBIT No. 30.

No. 24579.

By the Ocean Insurance Company.

[Stamp.]

This policy of insurance witnesseth that the president and directors of the Ocean Insurance Company do, by these presents, cause George M. Melcher, for account of loss, if any, payable to to be insured, lost, or not lost, three thousand dollars on ship Charles S. Pennel, at and from New York, to, at, and from San Francisco and Chinchas, with usual liberties of Callao, to a port of advice and discharge in Europe.

If on a passage at the end of the term, the risk to continue at pro rata premium until twenty-four hours after arrival at port of destination, and no longer, either on hull or freight Prohibited from carrying grain in bulk, from carrying passengers on more than one deck, and from being engaged in the coolie trade.

In case of loss under the continuation clause, three months' additional premium is warranted by the assured, any clause in this policy to the contrary notwithstanding, whereof is master for the present voyage, or whoever else shall be master in the said vessel, or by whatsoever other name or names the said vessel or master thereof is or shall be named or called, beginning the adventure upon the said as aforesaid, and to continue during the voyage aforesaid on the vessel until she shall be arrived and moored at anchor twenty-four hours in safety, and on the property until landed.

And it shall be lawful for the said vessel, in her voyage, to proceed and sail to, touch, and stay at any ports or places, if thereunto
287 obliged by stress of weather or other unavoidable accidents, without prejudice to this insurance.

Touching the adventures and perils which the said insurance company are contented to bear and take upon them in this voyage, they are—of the seas, fire, barratry of the master (unless the insured be owner of the vessel), and of mariners and all other losses and misfortunes which have or shall come to the damage of the said , or any part thereof, to which insurers are liable by the rules and customs of insurers in Portland, excepting such losses and misfortunes as are referred to by clauses in the margin of this policy, provided, that the insurers shall not be liable for any partial loss on hemp and flax, unless the loss amount to twenty per cent. on the whole aggregate value of *of* such articles, nor for any partial loss on saltpetre, gunny cloth, gunny bags, twine, jute, and East India hemp and skins, unless the loss amount to ten per cent. on the whole aggregate value of such articles, nor for any partial loss on sugar, flaxseed, bread, tobacco, and rice, unless the loss amount to seven per cent. on the whole aggregate value of such articles, nor for any partial loss on salt, grain, fish, fruits, hides, skins, ice, or other goods that are esteemed perishable in their own nature, unless it amount to seven per cent. on the whole aggregate value of such articles, and happen by stranding; nor for leakage of oil, unless it be occasioned by stranding or collision with another vessel; nor for any partial loss on other goods, or on the vessel or freight, unless it amount to five per cent., exclusive in each case of all charges and expenses incurred for the purpose of ascertaining and proving the loss; but the owners of such goods shall recover on a general
288 average. It is also agreed that the insurer shall not be liable for

partial loss or damage to bar, bundle, rod, hoop, plate, and sheet iron, wire of all kinds, tin-plates, steel, cassia in mats, linseed in pockets, and goods stowed loose.

It is further agreed that the insurers shall not be liable for damage or injury to goods by dampness, rust, change of flavor, or by being spotted, discolored, or mouldy, unless the same be caused by actual contact of sea water with the articles damaged, occasioned by sea perils; and that the company shall not be liable for loss or damage by wet or exposure to the elements of goods insured, as on deck, nor for any other loss on the same, unless it amount to twenty per cent., and then for the excess above fifteen per cent. only. In case of damage by perils of the sea to dry goods, cutlery, or other hardware, the loss shall be ascertained by a separation and sale of the portion only of the contents of the packages so damaged, and not otherwise; and the same practice shall obtain as to all other merchandize as far as practicable; and in case of any loss or misfortune, it shall be lawful for the insured, factors, servants, and assigns, to sue, labor, and travel for, in, and about the defense, safeguard, and the recovery of the said , or any part thereof, without prejudice to this insurance, to the charges whereof the said insurance company will contribute in proportion as the sum insured is to the whole sum at risk. And so the president and directors aforesaid are contented and do hereby bind the capital stock and other common property of the said insurance company to the insured, executors, administrators, and assigns for the true performance of
289 the premises, confessing themselves paid the consideration due unto them for this insurance by the insured, at and after the rate of twelve per cent., to return one per cent. if no loss occurs.

To add for each passage, viz, one per cent. if loaded with more than registered tonnage of guano, coal, salt, nitrate of soda, iron, copper ore or slate, either or in any combination, or with more than one-fourth of registered tonnage of marble, one-half per cent. if loaded with cargo of rice or teak wood; also to add one per cent. for each time in the North Sea between Oct. 1st and March 1st, or the Black Sea between May 1st and Sept. 1st, and Bay of Fundy between July 1st and Sept. 15th, and between Nov. 15th and April 1st, and River and Gulf of St. Lawrence between August 1st and October 1st.

Prohibited from the River and Gulf of St. Lawrence and Black Sea between Oct. 1st and May 1st; also from loading more than three-fourths registered tonnage of marble. One per cent. to add for each passage to or from Mexico or Central America, and one-half per cent. to add for each passage traversing West India latitudes between July 15th and Oct. 15th.

And it is hereby agreed, that if the insured shall have made any other insurance upon the aforesaid, prior in date to this policy, then the said insurance company shall be answerable only for so much as the amount of such prior insurance may be deficient towards fully covering the property at risk, whether for the whole voyage, or from one port of lading or discharge to another. And the said insurance company shall return the premium, or a rateable part thereof, upon so much of
the sum by them insured, or for such part of the voyage as they
290 shall be exonerated from by such prior insurance, excepting half per cent., which shall be retained in all cases of returned premium, provided that no returned premium shall be made for any passage whereon the risk has once commenced. And in cases of any insurance upon the said , whether it be for the whole or part of the voy-
Sum insured, $3,000. age, subsequent in date to this policy, the said insurance

company shall nevertheless be answerable to the full extent of the sum by them herein insured, without right to claim contribution from such subsequent insurance, and shall accordingly be entitled to retain the premium by them received, in the same manner as if no such subsequent insurance had been made; and in case of loss, such loss shall be paid in sixty days after proof and adjustment thereof, the amount of the premium note, without discount, if unpaid, and all sums due to the company from the insured when such loss becomes due, being first deducted, and all sums becoming due being first paid or secured to the satisfaction of the said president and dire'tors, they discounting interest for anticipating payment on notes not due. It is also agreed, that in case of capture or detention, the insured shall not have the right to abandon therefor, until proof is exhibited of condemnation or of the continuance of the detention (by capture or other arrest) for at least ninety days and that the insured shall not abandon in consequence of the port of destination being blockaded, but the vessel shall in such case have liberty to proceed to another safe port, not blockaded, and there end the voyage, or wait a reasonable time for the blockade of the original port of destination to be raised. It is agreed, that the insurers, without its being con-
291 sidered a waiver or acceptance of abandonment, may after a disaster take possession of, and repair the property insured, and that the acts of the insured or insurers, in recovering, saving and preserving the property insured, in case of disaster, shall not be considered a waiver or acceptance of abandonment; warranted by the assured free from any loss or expense by capture, seizure, restraint, blockade, condemnation, plunder, waste or destruction by any person or persons, or by or consequent upon the acts of any power or assumed power, or under the authority of any state or confederacy of states, now or heretofore included within the United States; and also from any loss whatever, occurring while under detention or restraint, any stipulations in this policy to the contrary notwithstanding.

Vessel valued at $65,000, premium included.

Freight valued at $; property valu'd at $, premium included.

Premium, $360 00
Policy, 1 25
$361 25

It is also agreed that the insurers shall not be answerable for any charge, damage, r loss which may arise in consequence of seizure or detention for or on account of illicit or prohibited trade, or trade in articles contraband of war; but the judgment of a foreign consular or colonial court shall not be conclusive upon the parties as to the fact of there having been articles contraband of war on board, or as to the fact of an attempt to trade in violation of the laws of nations. It is also agreed that this policy shall be void in case of its being assigned. transferred, or pledged without the previous consent, in writing, of the insurers. It is also agreed that the insured shall not have the right to abandon the vessel for the amount of damage merely unless the amount which the insurers would be liable to pay under an adjustment as of a partial loss shall exceed half the amount insured; and in case of
292 a total loss of the vessel, with salvage, the amount allowed out of the salvage to the officers and crew for wages earned or services rendered previously to the loss, shall be considered as so much of the salvage applied to the use of the shipo-wners, even although the same should be allowed or paid under the name of salvage, and not as wages, and shall accordingly be deducted in adjusting the loss. It is agreed that if any dispute shall arise relating to a loss on this policy it shall be submitted to the judgment and determination of arbitrators, mutually chosen, whose award, in writing, shall be conclusive and binding on all parties. It is further agreed that the usual leakage and differ-

ence of gauge of molasses from any foreign port or port in Louisiana or Texas, is eighteen per cent., and that the company is not liable for any loss thereon unless amounting to at least twenty-five per cent. net; if there shall be any lime on board, on cargo or on freight, fifty per cent. to be added to the premium for the passage. The company is not liable for wages or provisions, except in general average, when customary at ports of destination.

(On margin:) It is especially agreed, that instead of deducting one-third for new on the article of copper or other sheathing, there shall be deducted two and a half per cent. of recoppering after deducting the value of the old copper and nails for each and every month the copper shall have been on the vessel at the time of recoppering; and if the copper shall have been on forty months the cost of recoppering shall be wholly borne by the assured.

In witness whereof the president of the said Ocean Insurance Company hath hereunto subscribed his name and caused the same to be countersigned by their secretary at their office in Portland this 23d day of March, one thousand eight hundred and sixty-four.

(Signed) WM. W. WOODBURY,
President.

(Signed) GEO. A. WRIGHT,
Secretary.

293 EXHIBIT No. 31.

GEORGE M. MELCHER
vs.
OCEAN INSURANCE COMPANY.

APPLETON, C. J.

On the 30th January, 1864, the plaintiff, as master of the ship C. S. Pennell, of which he was part owner, and as agent for the other owners, chartered her to Messrs. Schön & Co., and to Mutzenbacher Sons, merchants, and as agents of Messrs. Witt & Schutte, Lima, for the purpose of taking a guano cargo from the Chincha Islands to Hamburg or Rotterdam.

It was provided by the charter-party, the C. S. Pennell being then at New York, that the said vessel shall sail on or before 1st June, 1864, to San Francisco, and thence proceed with all convenient dispatch to the port of Callao, Peru, where the captain shall immediately report his arrival to Messrs. Henry Witt & Schutte, of Lima; the vessel was then to proceed to the Chincha Islands, then load with guano, and after completing her loading to proceed to Hamburg or to Rotterdam, etc.

The charter-party is an unit, but one contract. It is between the parties to it, but one continuous voyage. Its terms are such as the parties choose to enter into. They are as binding during its continuance as to one portion of the chartered voyage as to another.

On 23d March, 1864, the defendants issued to the plaintiff the policy in suit, in and by which they caused him to be insured, lost or not lost, sixty-five hundred dollars on charter, twenty-six hundred dollars on primage, and also fifteen hundred dollars on property on board ship Chas. S. Pennell, at and from New York to San Francisco.

The evidence satisfactorily shows that this policy was intended to cover the charter party of January 30th, 1864.

294 On April 6th, 1864, the plaintiff sailed for San Francisco, in accordance with the charter; on the voyage, in May following,

the vessel was stranded on a coral reef, in longitude 38° 42′ west, latitude 17° 18′ south. After laying there some thirteen hours, she came off on a flood tide, or was taken by the master to Rio Janeiro, when it being found upon examination impossible to repair her, she was, in accordance with the recommendation of the surveyors, sold at public auction; proof of loss was duly made, but the defendants declined adjusting it, on the ground that the policies did not cover the guano charter.

The parties to the policy in suit had a right to make their own contracts. The policy might cover the whole or a part only of the chartered voyage. The civil war then raging, the plaintiff perhaps deeming the danger from the rebel cruisers to be greatest from New York to San Francisco, effected an insurance on that portion of the voyage described in the charter-party.

By this charter-party no freight was to be earned between New York and San Francisco, nor between San Francisco and the Chincha Islands. To give any effect to the policy it must be regarded as upon the freight, which would have been earned upon the whole voyage, if the loss occurred during a portion of the voyage which was insured, otherwise that part of the policy which insures sixty-five hundred dollars on charter, would practically be stricken out and would be of no avail.

In Davidson vs. Willasey, 1 M. & S., 313, a ship was chartered from Liverpool to Jamaica, then to take on board a full cargo for Liverpool at the current rate of freight, to be paid one month from the discharge of her cargo at Liverpool, and the ship-owners effected a valued policy on the freight, at and from Jamaica to her port of her discharge in the United Kingdom, and the ship arrived at Jamaica, and after taking on board one-half of the cargo was lost by storm, the remainder of her cargo being on shore and ready to be shipped; held that the
295 assured was entitled to recover as for a total loss. "The interest intended to be insured," remarks Lord Ellenborough C. J. "was the freight which the assured would have earned under the terms of the charter-party, if the voyage had not been stopped by the party insured against, which has been held for upwards of twenty years past to be an insurable interest as freight." In Barber vs. Fleming 5 Law Rep., Q., 1359, which resembled the case at bar in all its essential particulars, Cockburn, C. J., says: "It is a fallacy to say the freight is earned simply by bringing the cargo from the port of loading to the port of discharge, the freight is earned by the whole voyage which it is necessary to make to fetch the cargo and bring it home." But if the vessel is chartered for a circuitous voyage, and a policy is effected upon the chartered freight, the completion of the voyage is required to earn the freight; but if the voyage fails by reason of the perils insured against, the insured is entitled to recover, otherwise his policy would do him no good.

The law on this subject is very accurately stated by Mr. Justice Blackburn in Barber vs. Fleming: "I think," he observes, "as soon as the case is understood, it is very clear. It appears there is a policy of insurance made upon a voyage 'from Bombay to Howlands Island, and from thence to England." That is the description of the voyage. The nature of thing insured is 'freight chartered, or otherwise,' so that upon the face of the policy there is a bargain between the insured and the underwriters, which if, during that voyage, by one of the perils insured against, freight is lost, the underwriters should pay * * * When a ship's owner has got a contract with another person under which he will earn freight, and has taken ships and incurred expense

upon the voyage towards earning it, then his interest ceases to be a contingent thing, but become' an inchoate interest, and is an interest which if afterwards destroyed by any of the perils insured against is lost, and ought to be paid for by the underwriters." Here the vessel had started upon the voyage as chartered, and a part of which was insured, with a cargo provided on its arrival at the Chincha Islands.

296 The plaintiff's interest in the chartered freight had therefore commenced. The loss occurred during the portion of the voyage on which the insurance was effected.

The fact that there was a charter-party between the plaintiff and others, for a voyage from New York to San Francisco, and an insurance thereon by another company, constitute no defence, unless the liability of the defendants was thereby increased or injuriously affected. That there was to be a freight from New York to San Francisco, and the same was insured, was well known to the underwriters. The charter-party between the plaintiff and Schön and others, upon which the insurance in suit was effected, was binding in all its parts.

It mattered not what liabilities the plaintiff might have incurred to others, he was bound by his contract with them to its full and entire performance.

The underwriters cannot avail themselves of any contracts made by the plaintiff with others, when with a full knowledge of their existence they insured a specific charter and a specific risk. They assumed the risk for a portion of the chartered voyage for a consideration full' satisfactory. The plaintiff's interest attached the moment the vessel left New York on the chartered voyage which the defendants insured. It is nothing to them that the vessel was earning freight, unless the risk was thereby increased, and that is not alleged. Most assuredly they cannot complain, when they well know that such was to be the case, and the policy was issued with such knowledge. Indeed if the policy does not cover the risk as claimed, it covers nothing. The conclusion is irresistible that the defendants with a full knowledge of all the facts relied upon in the way of defence issued their policy in suit to protect the plaintiff from the very risk which has occurred.

The vessel being condemned and sold, and the voyage abandoned, the defendants are liable for the insurance on the charter and on primage for $9,200.

297 Satisfactory proof of loss was made on the 27th February, 1865, and the defendant's liability to pay accrued, according to the terms of the policy, for sixty days thereafter.

Judgment for plaintiff for $9,200, with interest from April 28th, 1865.

EXHIBIT No. 32.

[Sutton & Co.'s Dispatch Line, San Francisco Packets, 58 South street, N. Y.]

[Int.-rev stamp. 10 cents.]

This charter-party, made in the city of New York this twenty-fourth day of December, in the year one thousand eight hundred and sixty-three, between Chas. S. Pennell, esq., owner or part owner and agent for owners of the ship C. S. Pennell, of Bath, of the burthen of 975 tons or thereabouts, now lying in the harbor of Portland, of the first part, and Sutton & Co., of the second part, witnesseth:

That the said party of the first part, in consideration of the covenants and agreements hereinafter mentioned, to be kept and performed by

the said party of the second part, do covenant and agree on the freighting and chartering of said vessel to the said party of the second part, for a voyage from the port of New York to the port of San Francisco, California, on the terms following, viz:

First. The said party of the first part agrees the said vessel in and during the said voyage shall be kept tight, staunch, well fitted, and provided with every requisite, and with men and provisions necessary for such a voyage, and insure in the best New York offices at the lowest rate of premium.

Second. The said party of the first part further agrees that the whole of said vessel, including the state-rooms in cabin not used
298 by the officers, and deck houses not used for the crew, or for sails and stores, shall be at the sole use and disposal of the said party of the second part, or their agents, during the voyage aforesaid.

Third. The said party of the first part further agrees to take and receive on board the said vessel, during the aforesaid voyage, all such lawful goods and merchandise as the said party of the second part, or their agent, may think proper to ship, including seventy-five carboys of acid on deck if required, and to sign bills of lading therefor, without prejudice to this instrument, and without regard to the rate of freight filled into the bill of lading.

The vessel to be consigned to the order of the party of the second part in San Francisco, the party of the first part paying the consignees for the collection of the amount of freight list two and one-half per cent. commission.

It is further understood and agreed that no cargo whatever shall be received on board during the voyage, except with the consent, in writing, of the party of the second part.

And the said party of the second part, in consideration of the covenants and agreements to be kept and performed by the said party of the first part, do covenant and agree with the said party of the first part to charter and hire the said vessel as aforesaid, on the terms following, viz:

First. The said party of the second part do agree to furnish said vessel with a full cargo of lawful merchandize, or sufficient for ballast, during the voyage aforesaid.

Second. The said party of the second part doth further agree to pay the said party of the first part, or his agent, for the charter or freight of said vessel during the voyage aforesaid, twenty-six thousand five hundred dollars on the good and proper discharge of the cargo in the aforesaid port of San Franci'co, less two and one-half per cent. commission, as aforesaid.

Third. The said party of the second part further agree to give the party of the first part bills of lading to the amount of this charter-party in payment of the same.

299 It is further agreed between the parties hereto that the said party of the second part shall be allowed forty-five running lay days for the loading of said vessel at the port of New York, to commence from the time the ship is at her berth and ready for cargo, in usual good order, and newly painted, at the usual place for loading San Francisco vessels, say, between piers ten and twenty-six, East River, with ten lay days additional, at fifty dollars per day demurrage; and in case the vessel is longer detained the said party of the second part agrees to pay to the said party of the first part demurrage, at the rate of one hundred dollars per day for every day so detained, provided such detention shall happen by default of the said party of the second

part or their agent. Ship to be discharged with dispatch in San Francisco.

It is further agreed that the cargo shall be received and delivered alongside within reach of the vessel's tackles. It is also agreed that this charter shall commence when the vessel is ready to receive cargo at her place of loading, as aforesaid, and notice thereof is given to the party of the second part, or to their agent, in writing, and not to be loaded deeper than twenty feet three inches, even keel. It is understood and agreed that the ship having a water-tank no other water is to be carried below decks, and that the capacity for ship's stores, provisions, etc., is not to exceed, usual for such a voyage, barrels, bulk below decks; all expenses of weighing and measuring cargo on the wharf, advertising cards and placards in New York are to be paid by the charterers.

No commissions to be paid charterers in New York.

No passengers to be taken by either party. Ship to employ stevedores in New York satisfactory to the said party of the second part or their agents.

To the true and faithful performance of all the foregoing covenants and agreements the said parties do hereby bind themselves, their heirs, executors, administrators, and assigns, and also the said vessel, her appurtenances, and the freight money each to the other in the penal sum of twenty thousand dollars.

300 In witness whereof the said parties have hereunto in'changeably set their hands the day and year first above written.

(Signed) C. S. PENNELL.
(Signed) SUTTON & CO.

Signed and delivered in the presence of—
(Signed) E. D. THAYER.

We certify this to be a true copy of the original stamped charter.
THAYER & PEABODY.

EXHIBIT No. 33.—*March* 29, 1875.

NEW YORK, *Nov.* 2*d*, 1869.

Received from The Sun Mutual Insurance Company one hundred dollars, on account of legal expenses and services for defending The Ocean Insurance Company of Portland from claim for loss on charter and primage in case of the ship C. S. Pennell, reinsured by The Sun Mutual Insurance Company for The Ocean Insurance Company.
(Signed) JOHN RAND.

EXHIBIT No. 33.—*March* 30, 1875.

Cargo.

No. 45749.] By The Sun Mutual Insurance Company.

Conroy & O'Connor on account of whom it may concern, loss payable to them in funds current in the city of New York, do make insurance and cause to be insured, lost or not lost, at and from New York or Liverpool to San Francisco, on merchandize, free of
301 particular average, unless by stranding, and amount to twenty per cent. No risk to attach unless reported to and approved

by the company. Warranted by the assured free from claim for seizure or detention arising from acts of any belligerent nation or of any seceding or revolting State upon all kinds of lawful goods and merchandize, laden or to be laden on board the good vessel or vessels, whereof is master for this present voyage, or whoever else shall go for master in the said vessel, or by whatever other name or names the said vessel, or the master thereof, is or shall be named or called.

Beginning the adventure upon the said goods and merchandizes from and immediately following the loading thereof on board of the said vessel at as aforesaid, and so shall continue and endure until the said goods and merchandizes shall be safely landed at as aforesaid. And it shall and may be lawful for the said vessel in her voyage to proceed and sail to, touch, and stay at any ports or places, if thereunto obliged by stress of weather, or other unavoidable accident, without prejudice to this insurance. The said goods and merchandizes hereby insured are valued at .

Touching the adventures and perils, which the said Sun Mutual Insurance Company is contented to bear and takes upon itself in this voyage, they are of the seas, men-of-war, fires, enemies, pirates, rovers, thieves, jettisons, letters of mart and countermart, surprisals, takings at sea, arrests, restraints, and detainments of all kings, princes, or people of what nation, condition, or quality soever, barratry of the master and mariners, and all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the said goods and merchandizes, or any part thereof. And in case of any loss or misfortune it shall be lawful and necessary to and for the assured factors, servants, and assigns to sue, labor, and travel for, in and about the defense, safeguard, and recovery of the said goods and merchandizes, or any part thereof, without prejudice to this insurance; to the charges whereof the said insurance company will contribute according to the rate and quantity of the sum herein insured, having been paid the consideration for this insurance by the assured or assigns at and after the rate of three and one-half per cent., with additions and deductions to conform to the rates of the company, when the character of the vessel and time of sailing are known, subject to such addition or deduction as shall make the premiums conform to the established rate at the time the return is made to the company. Property on deck warranted free from claims for damage by wet, exposure, breakage, or leakage. And in case of loss, such loss to be paid in thirty days after proof of loss, and proof of interest in the said (the amount of the note given for the premium, if unpaid, being first deducted), but no partial loss or particular average shall in any case be paid, unless amounting to five per cent. Provided always, and it is hereby further agreed, that if the said assured shall have made any other assurance upon the premises aforesaid, prior in date to this policy, then the said Sun Mutual Insurance Company shall be answerable only for so much as the amount of such prior assurance may be deficient towards fully covering the premises hereby assured; and the said Sun Mutual Insurance Company shall return the premium upon so much of the sum by them assured, as they shall be by such prior assurance exonerated from. And in case of any insurance upon the said premises subsequent in date to this policy, the said Sun Mutual Insurance Company shall nevertheless be answerable for the full extent of the sum by them subscribed hereto, without right to claim contribution from such subsequent assurers, and shall accord-

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ingly be entitled to retain the premium by them received in the same manner as if no such subsequent assurance had been made. It is also agreed that the acts of the insured or insurers in recovering,
303 saving, and preserving the property insured, in case of disaster, shall not be considered a waiver or acceptance of an abandonment. It is also agreed that the property be warranted by the assured free from any charge, damage, or loss which may arise in consequence of a seizure or detention, for or on account of any illicit or prohibited trade, or any trade in articles contraband of war.

If laden on board a vessel of a belligerent nation, warranted free from loss or expense, arising from capture, seizure, or detention, or the consequences of any attempt thereat; or if by a neutral vessel, warranted not to abandon in case of capture, seizure, or detention, until after condemnation of the property insured, nor until ninety days after notice of said condemnation is given to the company; also, warranted not to abandon in case of blockade, and free from any expense in consequence of capture, seizure, detention or blockade, but in the event of blockade to be at liberty to proceed to an open port, and there end the voyage; any stipulations in this policy to the contrary notwithstanding.

Premium,	$750 00
Policy,	1 25
	$751 25

In case of claims for damage on dry goods or hardware exceeding fifteen per cent., the company to have the privilege of settling upon the principle of a salvage loss, paying to the assured the sum insured, with the freight and duties.

In witness whereof, the president or vice-president of the said Sun Mutual Insurance Company hath hereunto subscribed his name and the sum insured, and caused the same to be attested by their secretary in New York, the fifteenth day of March, one thousand eight hundred and sixty-two.

MEMORANDUM.—It is agreed, that bar, bundle, rod, hoop and sheet-iron, wire of all kinds, tin-plates, steel, madder, sumac, wickerware and willow, manufactured or otherwise, salt, grain of all kinds, tobacco, Indian meal, fruits, (whether preserved or otherwise), cheese, dry
304 fish, vegetables and roots, rags, hempen yarn, bags, cotton bagging and other articles used for bags or bagging, pleasure carriages, household furniture, skins and hides, musical instruments, looking-glasses, and all other articles that are perishable in their own nature, are warranted by the assured free from average, unless general; hemp, tobacco stems, matting and cassia, except in boxes, free from average under twenty per cent., unless general; and sugar, flax, flaxseed, and bread, are warranted by the assured free from average under seven per cent., unless general; and coffee in bags or bulk, and rice free from average under ten per cent., unless general.

Warranted by the assured free from damage or injury from dampness, change of flavor, or being spotted, discolored, musty or mouldy, except caused by actual contact of sea water with the articles damaged, occasioned by sea perils. In case of partial loss by sea damage to dry goods, cutlery, or other hardware, the loss shall be ascertained by a separation and sale of the portion only of the contents of the packages so damaged and not otherwise; and the same practice shall obtain as to all other merchandize as far as practicable.

U. S. I. R. Stamp, 25 cts. cancelled.

Warranted by the assured free from all claim for loss or damage arising from any warlike or belligerent act, or from capture, seizure, restraint, or detention by any privateer, cruiser or armed vessel whatsoever.

This company is not liable for leakage on molasses or other liquids, unless occasioned by stranding or collision with another vessel.

If the voyage aforesaid shall have been begun and shall have terminated before the date of this policy, then there

shall be no return of premium on account of such termination of the voyage.

In all cases of return of premium in whole or in part, one-half per cent. upon the sum insured is to be retained by the assurers.

$20,000 (twenty thousand dollars).

M. H. GRINNELL,
President.

E. R. ANTHONY,
Secretary.

305 1864. March 16. Additional $20,000 (twenty thousand dollars), subject to U. S. paper currency clause.

Warranted by the assured free from all claim for loss or damage arising from any warlike or belligerent act, or from capture, seizure, restraint, or detention by any privateer, cruiser, or armed vessel whatsoever.

M. H. GRINNELL,
President.

W. R. ANTHONY,
Secretary pro tem.

1863. January 22. Additional $20,000 (twenty thousand dollars).

J. WHITEHEAD,
Vice-President.

W. R. ANTHONY,
Secretary pro tem.

[U. S. I. R. Stamp. 25 cts. Cancelled.]

(Endorsed:) 1864, March 16. Ship C. S. Pennell, New York to San Francisco. Free of particular average, unless occasioned by stranding, and amounts to twenty per cent. Amount, $2,632; rate, $2\frac{1}{2}$; premium, $65.80.

(Endorsed:) 1864, March 18. Ship C. S. Pennell, New York to San Francisco. War risk; amount, $2,632; rate, 3; premium, $78.96.

306 At a stated term of the district court of the United States of America for the southern district of New York, held at the United States court rooms, in the city of New York, on Tuesday, the fourth day of January, one thousand eight hundred and seventy-six.

Present, the honorable Samuel Blatchford, district judge.

THE OCEAN INSURANCE COMPANY
vs.
THE SUN MUTUAL INSURANCE COMPANY.

This cause having been heard on the pleadings and proofs, and argued and submitted on briefs and points, by the advocates for the respective parties, and due deliberation being had in the premises, it is now ordered, adjudged, and decreed by the court, that the libel therein be, and the same is hereby, dismissed, with costs of the respondents, against the said libellants to be taxed.

And the costs of the respondents having been taxed at the sum of one hundred and thirty-seven dollars and twelve cents ($137\frac{12}{100}$), it is further ordered, adjudged, and decreed that The Sun Mutual Insurance Company, the said respondents, recover of The Ocean Insurance Com

pany, the said libellants, the said sum of one hundred and thirty-seven dollars and twelve cents ($137\frac{12}{100}$), being the amount of the costs of said respondents as taxed aforesaid.

And it is further ordered that unless an appeal be taken from this decree within the time prescribed by law, and the rules and practice of this court, the stipulators for the libellants' costs forthwith pay
307 into the registry of this court the amount of their stipulation; and that upon such payment thereof into the registry of the court, the clerk distribute the proceeds thereof in satisfaction of the respondents' taxed costs.

SAMUEL BLATCHFORD.

U. S. district court.

THE OCEAN INSURANCE COMPANY, LIBELLANTS,
against
THE SUN MUTUAL INSURANCE COMPANY, RESPONDENTS.

GENTLEMEN: Please take notice that the libellants herein hereby appeal to the circuit court of the United States for the southern district of New York, from the final decree entered in this cause.

Dated January 13, 1876.

Yours, &c.,

BENEDICT, TAFT & BENEDICT,
Libellants' Proctors.

TO EVARTS, SOUTHMAYD & CHOATE, Esqs.,
Respondents' Proctors.

GEO. F. BETTS, Esq., *Clerk.*

308 Circuit court of the United States for the southern district of New York.

THE OCEAN INSURANCE COMPANY, LIBELL'TS and appellants,
against
THE SUN MUTUAL INSURANCE COMPANY, RESP'TS and appellees.

To the honorable the circuit court of the United States for the southern district of New York, in the second circuit:

The appeal of the above-named appellants respectfully shows:

That on or about the 24th day of September, 1873, the above-named libellants and appellants, The Ocean Insurance Company, exhibited their libel in the district court of the United States for the southern district of New York against the above-named respondents and appellees, The Sun Mutual Insurance Company, claiming over fifty dollars, praying, among other things, that the respondents be compelled to pay the libellants' claim and costs, as on reference thereto will more fully appear.

That thereupon process was duly issued to the marshal of the United States for the southern district of New York, and thereafter the respondents duly appeared, and on or about the 13th day of November, 1873, filed their answer to said libel, praying, for the reasons therein

set forth, that said libel be dismissed, with costs in that behalf, as by reference thereto will more fully appear.

That thereafter, and on or about the 25th, 29th, 30th, and 31st
309 days of March, 1875, the said cause came on to be heard before the honorable Samuel Blatchford, judge of the said district court, upon the pleadings and the proofs introduced by the respective parties, and the said judge having advised thereon, on or about the 4th day of January, 1876, made a final decree in said cause, whereby it was ordered and adjudged that the said libel herein be dismissed, with costs.

And these appellants are advised and insist that the said decree is erroneous, and ought to be reversed, inasmuch as they were entitled to recover the amount of their said claim in the libel mentioned, with interest and costs.

And these appellants, for these and other reasons, appeal from the whole of said decree to the next circuit court to be held in said district, and on said appeal they intend to have said cause heard anew in the circuit court, on the pleadings and proofs in the district court, and on other and further proofs to be introduced by them in the said circuit court.

And they pray that the record and pleadings and proceedings and proofs may be returned to the said circuit court, and that the said decree may be reversed, and that the libellants and appellants may be adjudged entitled to recover the amount of their claim in the libel mentioned, with interest and costs, or that such other decree may be made as to said circuit court may seem just.

BENEDICT, TAFT & BENEDICT,
Proctors for Libellants and Appellants.

E. C. BENEDICT,
Advocate.

Know all men by these presents that we, Daniel F. Appleton, of the city of New York, and Francis R. Appleton, of the same place, are held and firmly bound unto The Sun Mutual Insurance Company in the sum of five hundred dollars, to be paid to the said The Sun
310 Mutual Insurance Company, its successors or assigns, for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals, dated the day of January, in the year of our Lord one thousand eight hundred and seventy-six.

Whereas The Ocean Insurance Company, as appellants, have appealed to the circuit court of the United States for the southern district of New York, in the second circuit, from a decree of the district court of the United States for the said southern district, bearing date the fourth day of January, 1876, in a suit in which The Ocean Insurance Company is libellant against The Sun Mutual Insurance Company:

Now, therefore, the condition of this obligation is such that if the above-named appellant, The Ocean Insurance Company, shall prosecute and appeal with effect, and pay all damages and costs which shall be awarded against it as such appellant therein if it shall fail to make said appeal good, then this obligation shall be void, otherwise the same shall be and remain in full force and effect.

D. F. APPLETON. [L. S.]
FRANCIS R. APPLETON. [L. S.]

Signed and delivered, and taken and acknowledged this 27th day of January, 1876, before me.

EDWARD L. OWEN,
U. S. Commissioner for the Southern District of New York.

311 UNITED STATES OF AMERICA,
Southern District of New York, ss:

Daniel F. Appleton and Francis R. Appleton, being duly sworn, each deposes and says that he resides in the southern district of New York; that he is worth the sum of one thousand dollars over and above all his just debts and liabilities.

D. F. APPLETON.
FRANCIS R. APPLETON.

Sworn to this 27th day of January, A. D. 1876, before me
EDWARD L. OWEN,
U. S. Commissioner for the Southern District of New York.

This bond approved, as to form and amount and sufficiency of surety. Dated New York, January 27, 1876.

312 District court of the United States for the southern district of New York. In admiralty.

THE OCEAN INSURANCE COMPANY
vs.
THE SUN MUTUAL INSURANCE COMPANY.

Opinion.

BLATCHFORD, J.:

This is a libel filed by The Ocean Insurance Company, a marine insurance corporation, of Portland, Maine, against The Sun Mutual Insurance Company, a marine insurance corporation, of the city of New York, to recover upon a policy of insurance issued by the respondents to the libellants. The libel alleges that before the 20th of March, 1864, the libellants and the respondents entered into an agreement that the respondents should, on request, reinsure the libellants on risks taken by the libellants on all such risks as the respondents should from time to time approve and endorse on an open policy, to be made by the respondents; that the respondents made their open policy, whereby they insured the libellants upon the risks specified in the libel, which were approved by the respondents and endorsed on the policy; that the ship Charles S. Pennell being in the port of New York, and George M. Melcher being the owner of one-eighth of said vessel and being
313 her master, and said vessel having been chartered on the 30th of January, 1864, to A. J. Schön & Co. and J. D. Mutzenbecher Sons, merchants and agents of Messrs. Henry Witt & Shutte, Lima, agents of the Supreme Government of Peru, and their consignees of guano in Germany, for a voyage on the high seas from New York to San Francisco, thence to Callao and the Chincha Islands, for a cargo of guano, and thence to Hamburg or Rotterdam with said cargo, said charter-party being of the value of $52,400, and the primage thereon being of the value of $2,650; and said Melcher being interested in said charter and said primage, and being the owner of certain property on board of said ship, the libellants insured said Melcher on the high seas,

at and from New York to San Francisco, $6,550 on charter, meaning the said charter, $2,650 on primage, meaning the said primage, and also $1,500 on property on board, meaning said property, against the perils of the seas and other perils enumerated in said policy; that thereupon the libellants, on the 23d of March, 1864, being interested in said charter and said primage, and said property on board, and said insurance thereon, for the reimbursement of the libellants thereon, made an application to the respondents to enter upon said open policy $6,550 on charter, $2,650 on primage, and $1,500 on property on board said ship at and from New York to San Francisco aforesaid, including war risk, being the same risk insured by the libellants; and that the respondents on the receipt of said application approved the same and endorsed the same on said open policy at a premium which was paid. The libel then avers the loss of the vessel while on said voyage by the perils of the seas, and before she reached San Francisco; that thereby said Melcher wholly lost said charter, and his said interest therein, and said primage, and said property, whereby the libellants, as such insurers, became liable to pay the said several sums, amounting to $10,700, to said Melcher; that on notice of said loss to the libellants they gave notice thereof to the respondents; that the respond-
314 ents then declared that payment of the loss should be refused, and it was accordingly refused, and an action was thereafter brought by said Melcher, in the supreme judicial court of Maine against the libellants, to recover the same, and such proceedings were thereupon had that said Melcher, on the 7th of December, 1872, recovered against the libellants, on the policy given by them, the sum of $9,200 and interest from April 28th, 1865, of which recovery the libellants paid, before judgment was entered, $4,234.29, and on June 28th, 1873, judgment was duly entered for the balance of said recovery, $9,473.71, and costs, taxed at $574.17; that, by reason of the premises, the libellants became liable to pay to said Melcher said loss and costs so recovered, and the respondents became liable, under said open policy and said loss and said judgment and payment, to pay said loss and costs to the libellants, with interest, and also the further sum of $1,164.70 counsel fees, costs, and expenses of said suit, paid by the libellants, other than the costs above mentioned, with interest thereon from the time of such payment, July 23d, 1873; and that due proof of loss, costs, expenses, and counsel fees, and of interest, was furnished to the respondents more than thirty days before the commencement of this action, and payment was demanded of the respondents and refused.

The answer sets up various defences, but, as one of them seems to be conclusively established, and that the main one, and one which goes to the foundation of the action, it will be necessary to refer to only that one. The answer avers that at the time of the application by the libellants to the respondents for the reinsurance mentioned in the answer, the respondents had not, nor had any of its officers or agents, heard of any charter of the said ship for a voyage on the high seas from New York to San Francisco, thence to Callao and the Chincha Islands, for a cargo of guano, and thence to Hamburg or Rotterdam with said cargo, nor did either of them have any intimation of any such charter until after the loss of said ship; that at the time of such application for reinsurance the said ship was lying in the port of
315 New York, bound on a voyage to San Francisco, and under a charter to carry a cargo of coal and other merchandise from New York to San Francisco; that she was then nearly or entirely loaded and ready to sail upon that voyage and upon no other, as was well

known to the respondents and to other persons having dealings with said ship; that, on the 23d of March, 1864, the libellants sent to the respondents an application in the following words: "To The Sun Mutual Insurance Company: Enter on open policy of this co., 51564, $6,550 on charter, $2,650 on primage, $1,500 on property on board ship Chas. S. Pennell, at and from N. York to San Francisco, including war risk; rate 6 %;" that the respondents, understanding said application to refer to the charter of said ship on her said voyage from New York to San Francisco, on which she was then bound, and under which charter she had been then nearly or completely loaded with merchandise to be carried to San Francisco, and not being aware or having heard of any other charter of said vessel, thereupon endorsed the same on said open policy; that after the happening of the disaster to said ship, said Melcher claimed that the policy issued to him by the libellants related to the guano charter and the primage on the charter money mentioned therein, and that he was entitled to recover the said sums of $6,550 and $2,650 from the libellants, for his interest in said last-mentioned charter and primage; that such claim was disputed and refused by the libellants, on the express ground that said policy issued by the libellants had no application to the guano charter, but referred and was intended to apply only to the charter under which the vessel was employed to carry said cargo of coal and other merchandise from New York to San Francisco; that the libellants having, in April, 1865, given to the respondents notice of the making of such claim, the respondents acquiesced in such dispute and refusal of the same, and did, so far as the respondents were concerned, refuse to recognize said claim as falling within the terms of the said reinsurance policy; that thereupon said action was
316 brought by said Melcher against the libellants, and said judgment was recovered; that said judgment was given against the libellants mainly upon the ground that one Sawyer, who was the said Melcher's agent for effecting said insurance and other insurances upon his interest in said ship, applied to said libellants for such insurances of $6,550 and $2,650, and, at the time of such application, produced and exhibited to the president of the libellants, to whom personally such application was made, a letter from said Melcher to said Sawyer, requesting the latter to procure insurances of said sums of $6,550 and $2,650 upon said guano charter and the primage of the same, and that upon the strength of evidence of those facts, and of such evidence alone, the insurance made by the libellants was held to be applicable to the guano charter; that said letter was never exhibited or communicated to the respondents, or to any of its officers or agents, by the libellants, nor did the respondents ever know or hear of its existence, or of any purpose or intention on the part of the said Melcher or his agent, or on the part of the libellants, to make the policy issued by the libellants applicable to the guano charter, until about the month of January, 1872, when it was brought to the attention of the respondents by their counsel, after an examination by him of the proceedings on the trial of the action of Melcher against the libellants; that the respondents immediately notified the libellants, through their counsel, of the refusal of the respondents to be bound by any judgment rendered in said action which should be based on the fact of the exhibition of said letter by said Sawyer to the president of the libellants, or upon anything which took place between the president and said Sawyer when the original insurance was applied for by the latter, inasmuch as none of said matters were communicated to the respondents at the time of the application for said reinsurance; that the respondents, at the time they made such reinsurance, had not,

nor had any of their officers, any knowledge or information of
317 any matter or thing in regard to said original insurance, or of its application to any particular subject matter other than the notice from the libellants to the respondents above set forth, requesting the latter to enter the said sums of $6,550, $2,650, and $1,500 upon the said reinsurance policy, and had no knowledge or information of any fact, matter, or thing which could operate to make the said insurance, so far as concerned the said $6,550 and $2,650, applicable to any other subject-matter than the said charter under which the said ship was employed to carry a cargo of coal and other merchandise from New York to San Francisco; and that if the respondents had had knowledge of any such fact, matter, or thing, and especially if they had been aware of any purpose to make the said insurance applicable to the guano charter, they would have declined to become the libellants' reinsurer therefor, for the reasons, among others, that it would have involved a large over-insurance upon or in respect of the said Melcher's interest in the said ship, and that the accumulation of so large an amount of insurance thereon (making nearly three times its value) would have been contrary to the rules and principles which govern prudent underwriters in making insurances, and would have offered strong inducements to said Melcher, supposing him to be subject to pecuniary temptation, to cast said ship away.

I regard it as clearly established that the respondents did not insure the guano charter. The transactions between the parties were effected wholly by correspondence. On the 23d of March, 1864, the president of the libellants wrote a letter to the vice-president of the respondents, saying: "I also enclose returns for registry as follows: $5.000 on ship C. S. Pennell to S. Francisco & Chinchas—war; $5,000 on pe. of do.—marine." Then, in a postscript to the letter, he says: "P. S.—I also enclose an additional return for insurance on charter, primage, & property per ship C. S. Pennell, to San Francisco only." The returns enclosed were these, all of them dated March 23d, 1864:

(1) "Enter on open policy of this co. 51564, war risk only,
318 $5,000 on ship Chas. S. Pennell, at & from N. York to, at, & from San Francisco & Callao to Chinchas—rate 3 %." (2) "Enter on open policy of this co. 51564, $5,000 on charter of ship Chas. S. Pennell at & from New York to, at, & from San Francisco & Callao to Chinchas—rate 3 %." (3) "Enter on open policy of this co., 51564, $6,550 on charter, $2,650 on primage, & $1,500 on prop'ty, on board ship Chas. S. Pennell, at & from N. York to San Francisco, including war risk—rate 6 %." It is the insurance made on the last mentioned return that is the subject of the present suit. The respondents received no information from the libellants as to what the charter intended was, except such as is contained in the three returns above set forth and in the letter enclosing them.

From the policy issued by the libellants to Melcher on the 23d March, 1864, it appears that the insurance made by them was described in that policy as "$6,550 on charter, $2,650 on primage, & also $1,500 on property on board ship Chas. S. Pennell, at & from New York to San Francisco." From the record of the proceedings in the suit brought against the libellants by Melcher it appears that he alleged that the libellants, by their policy, insured the guano charter. To prove this he introduced as a witness one Sawyer, who, as the agent of Melcher, personally effected the insurance for Melcher at the office of the libellants. He did so in pursuance of a letter which he had then just received from Melcher, dated New York, March 20th, 1864. In that

letter Melcher said: "I want you to insure on my part of the ship as follows: Say war risk out to San Francisco, ship, $5,000; charter to San Francisco, $26,500, ⅛ $3,300; primage on same, $1,325; homeward charter from Chinchas, insure out, say 1,750 tons, at £4, £7,000, at current rate of exchange $52,400, my ⅛, $6,550; primage on same, $2,650; chronometers, $500; and on our effects, clothing, &c., $1,000; making, total, $19,425." The written application which Sawyer signed on the libellants' books was in these words: "I wish for Geo. M.
319 Melcher $6,550 on charter, and $2,650 on primage, and $1,500 on property on board ship Charles S. Pennell, at and from New York to San Francisco, including war risk." But Sawyer testified as follows on that trial:

"Q. State whether or not you exhibited that letter to the president of the company at the time you applied for insurance. A. I did. Q. At whose request did you exhibit it to him? A. At his own; he asked me to hand him the letter. Q. Did he take it and examine it? A. He took it and, I suppose, examined it; he made some comments on it. Q. What time in the day did you receive the letter? I think it came in the noon train; I got it about 2 o'clock in the afternoon, and went to The Ocean Ins. Co. the next morning at 10 o'clock. Q. State all that was said and done between yourself and the officers of this company at the time in relation to this policy of insurance and the subject-matter insured. (Defendant objects to both form and substance. Admitted subject to objection.) A. After effecting an insurance on the ship, Mr. Woodbury (the president) asked me if I could give him any other insurance; I told him I had received a letter from Captain Melcher requesting me to insure a guano charter; he said, 'Let me see the letter.' I passed it over the desk to him; he took it in his hands and says, '1,750 tons—aint that a large amount to insure on that ship?' I told him I had insured the ship in his office when she carried 1,800 tons in her. He said, 'Homeward charter, insure out—why didn't the captain ask you to insure all the way round, as he had the ship?' My answer was, before the ship got through, if the war closed, he could effect the insurance cheaper; I was to be advised by Captain Melcher, on his arrival at San Francisco, and agreed with him to insure in his office, if he took it; he made some other comments; among others he said, 'What did Foy, take the New York insurance for?' I told him six per cent., with the scrip earnings back. After some little talk he told me he would take this at
5½, and I was going to leave the office; he said, 'It will
320 be necessary to make application,' or sign one; Wright copied an application onto his book, and I signed it without reading it; I don't know what I signed; it was mere form, I supposed. Q. Did he make any other comment in relation to the statement in the letter you showed him, or figures? A. He asked me what the captain rated the pound at; I told him, I thought about $8; he took a pen and figured over on the desk, and said he thought it was about that himself. Q. Did he read any part of the letter about pounds when he made those figures? (Objected to by defendant; admitted subject to objection.) A. He did. . Do you hold in your hand the letter you carried to Mr. Woodbury? A. I do. Q. State what part he read when he asked you how the captain figured the pound. (Objected to; admitted subject to objection.) I cannot tell you what part he read; he said, 'Say 1,750 tons, at £7,00 "; then he ask' me what the captain cast this insurance for at the pound; I cannot state all that was said; six years have passed; I am giving the subject-matter as well as I can.

Q. Had he just been examining the letter when he made that statement? A. He had; I think he held the letter in his hands or on the desk when he made the figures. Q. What charter did you tell Woodbury you wanted insured at the time? A. A guano charter. Q. What description did you give him of the charter? A. I told him the captain was chartered for guano; he says, 'I know it; Pennell has been in talking with me about it this afternoon.' Q. Did you state what voyage the guano charter was for? A. I don't know that I did, for we had stated the voyage a few minutes before in effecting the insurance on the ship; I had effected an insurance on the same route a few minutes before; the same voyage for which this guano charter was for. Q. Did you apply for any insurance to The Ocean Insurance Company upon any other charter or freight, except the guano charter? A. I did not at that time. Q. Upon what voyage had you obtained insurance upon the ship at The Ocean Insurance Company's office at this same
321 time? A. New York to San Francisco, with liberties of Callao, to the Chinchas, and from thence to a port in Europe. Q. Where did the conversation you have related take place? A. In The Ocean Insurance Company's office in Exchange street; three or four days after that I went for the policies. Q. Who did you see there? A. Mr. Wright; I think no one else; he is the secretary of The Ocean Insurance Company. Q. What was said in relation to this charter? A. I opened the policy and read '$6,550 on charter;' I says to Wright, 'You have left out the word 'guano';" said he, 'That don't make any difference; the insurance you effected with Foye was freight; this is charter;' I said to him, 'Hadn't you rather have charter than freight?' 'No,' said he, if I get freight and the vessel is wrecked, the freight helps forward itself, whereas charter is a total loss.' Q. Have you stated all the first conversation in relation to what Woodbury said to you about effecting this insurance? A. He said a good deal in relation to not insuring the round voyage; I think I told him I should not insure her guano charter with a war risk; he wanted to know why; I told him the Southern Confederacy privateers did not burn guano ships; he referred me to one instance where it had been done. Q. State what else you recollect was said in relation to that subject-matter of insurance at Woodbury's office at the first conversation, if anything. (Defendant objects to both form and substance.) A. I told him I would put implicit confidence in his insuring me; told him I had made a mistake in insuring the last time, and I wanted this guano charter insured out, and I wanted no mistake about it; he gave me to understand there should be none."

All the foregoing testimony of Sawyer was seasonably objected to by the counsel for the defendants in that suit, and was admitted by the court subject to objection. After this and the other evidence on the trial had been introduced, the judge before whom the cause was tried being of opinion that it was desirable, before proceeding further in the cause, to take the opinion of the full court upon the question of the admissibility of the evidence
322 which had been put in by the plaintiff subject to the defendant's objection, the case was withdrawn from the jury and reported to the court for their opinion as to whether any of said evidence was admissible, and, if any, what portion thereof, and, after the determination of those questions, the cause to stand for trial, if either party should so desire. The questions raised were argued before the full court. The decision is reported in 59 Maine, 217. The court held that insurance of the charter meant insurance of the freight to be earned

under the charter. As the vessel at the time she was lost was sailing under two charters, one requiring her to carry coal and other merchandise from New York to San Francisco, and the other requiring her to carry a cargo of guano from the Chincha Islands to Hamburg or Rotterdam, and as she was lost on the outward voyage, the court considered the question to be whether extrinsic evidence was admissible to show which of the two charters was the one insured by the defendants in that suit. The plaintiff having offered to prove that it was the guano charter, the defendants resisted on the ground that the words in the policy, "at and from New York to San Francisco," were descriptive of the charter insured, and that extrinsic evidence that any other charter was intended was not admissible, as its effect would be to vary and not explain the policy. The court held that the words "at and from New York to San Francisco" did not describe any portion of the property insured, but described simply the voyage during which the risk was to continue, and did not describe both the voyage and the charter; that, as a charter was insured by the policy, and two charters were shown to exist, either of which would answer the call in the policy, the case was one of a latent ambiguity, to remove which extrinsic evidence might be resorted to; and that, therefore, the evidence offered by the plaintiff was admissible for that purpose, and the action must stand for trial. The second trial took place, and the same evidence of Sawyer that is above detailed was given, and it was proved that the
323 vessel sailed from New York to San Francisco loaded with a general cargo for San Francisco, with a charter from New York to San Francisco, and that Melcher's interest under that charter was covered by other previous insurance. The case was then withdrawn from the jury and submitted to the court, to enter such judgment as the law and the evidence should require. The court held (60 Maine, 77) that the evidence satisfactorily showed that the policy sued on was intended to cover the guano charter; that the voyage covered by that charter was a continuous one from New York to San Francisco, thence to Callao, thence to the Chincha Islands, there to load with guano, and thence to Hamburg or Rotterdam; that the insurance effected by the policy sued on was on so much of said voyage as was to begin at New York and terminate at San Francisco; that as, under the charter, no freight was to be earned between New York and San Francisco, and none between San Francisco and the Chincha Islands, the policy, to give any effect to it, must be regarded as one upon the freight which would be earned during the whole voyage, if the loss should occur between New York and San Francisco; that, as the vessel had started on her chartered voyage, Melcher's interest in the chartered freight had commenced and was an insurable interest as freight; that the fact that there was a charter between Melcher and others for a voyage from New York to San Francisco, and an insurance thereon by another company, constituted no defence, unless the liability of the defendants was thereby increased or injuriously affected; that the defendants knew that there was to be freight from New York to San Francisco, and that the same was insured, and, with such knowledge, insured the risk for a portion of the voyage covered by the guano charter; and that they were liable for the $9,200 insurance on charter and primage. Judgment was given accordingly.

On the trial of the present action, the policy which the libel-
324 lants issued on the 23d of March, 1864, on Melcher's interest in the vessel, and which Sawyer, in his testimony in the suit in Maine, described as an insurance for the voyage covered by the guano

charter, has been put in evidence. That policy insures Melcher "$3,000 on ship Charles S. Pennell, at & from New York to, at, & from San Francisco & Chinchas, with usual liberties of Callao, to her port of advice and discharge in Europe."

The evidence in the present suit shows that the respondents co-operated with the libellants in resisting the claim made against the libellants by Melcher, in the suit in Maine, until it appeared, by the decision, to admit the parol evidence offered by Melcher, that the libellants were to be held liable, by means of such evidence, for an insurance of the guano charter, but that, from and after that time, the respondents asserted to the libellants that the respondents were not bound by anything which was not communicated to them when they insured the libellants, and that the respondents would not admit that they could be held to have insured the guano charter. On the 16th of January, 1872, as soon as the court had decided that the parol evidence was admissible, the attorneys for the libellants sent to the respondents a copy of the opinion of the court. The respondents submitted that opinion to their counsel and received his written views thereon, a copy of which they sent to the libellant's attorneys on the 29th of January, 1872, in a letter of that date, which said: "If the effect of the admission of the evidence of the plaintiff in the suit against the Ocean Insurance Co. will be to hold them liable on a risk different from that described in and reinsured under our policy to them, we, not being reinsurers of such risk, of course have no interest." The attitude then assumed by the respondents was always subsequently maintained.

The respondents insured a charter and primage for a voyage from New York to San Francisco. What charter? It is not shown that any of the information which Sawyer communicated to the libellants
325 was made known to the respondents nor that the latter knew of the guano charter, or of the insurance made by the libellants on Melcher's interest in the vessel for the voyage covered by the guano charter. But, it is shown that the ship sailed from New York under a charter from New York to San Francisco. That charter is in evidence. It was made a month before the guano charter was made. It charters the vessel for a voyage from New York to San Francisco, for a full cargo of merchandise, no cargo to be received on board during the voyage without the consent in writing of the charterers, the charter money to be $26,500 (the sum named in Melcher's letter to Sawyer as "charter to San Francisco") payable on discharge of the cargo at San Francisco. It is also shown that the respondents, a few days before they insured the libellants on the risk in question, entered on an open policy issued by them to a customer, two risks of merchandise by the ship Charles S. Pennell from New York to San Francisco, and that the vessel was advertised by such charterers as a general ship for a voyage from New York to San Francisco, in a newspaper which was taken by the respondents, and otherwise, and that she was loading with cargo for some time at New York for such voyage. It is also shown, by abundant evidence, in the testimony of experienced marine underwriters, that, in an application for insurance "on charter, at and from New York to San Francisco," where there are two charters, and one of them is over part of the route of the other, it is material to the risk that the applicant should disclose the existence and termini of the two charters, and the fact that the insurance applied for is intended to cover the risk of the charter for the longer route over the shorter route. The reasons which the witnesses give for this conclusion are plain and satisfactory. It is worth a higher rate of premium to take the risk of

a given amount on the guano charter, over the route from New York to San Francisco, than it is to take the risk of the same amount on the charter from New York to San Francisco over the same route,
326 because, in the former insurance, in case of a disaster, there would be no possibility of any salvage by forwarding cargo to its destination by another vessel, whereas in the latter insurance, there might be such salvage which, if the disaster occurred near the port of destination, would be large. Moreover, such disclosure in respect to the two charters is material to enable the insurer to determine whether he will insure at all or not. One of the expert witnesses expresses his views as follows: "If the insurance were applied for without such disclosure, I should regard it as an application to insure simply the freight money dependent upon the delivery of cargo at San Francisco, whilst, with the disclosure, I should understand it to be a proposition to make an insurance which I should understand to be a wager policy, as there would be no interest to be transferred to the underwriter, or from which he could, by any possibility, derive salvage. As an underwriter, I believe such an insurance as that last mentioned to have an immoral tendency, as offering to a master a temptation to lose his vessel on such voyage, and I, invariably, as an underwriter, refuse such an insurance. In case of a total loss, the insured would receive pay from the insurer not only for the whole freight depending on the passage from New York to San Francisco, but for the expected freight, and that without the very considerable outlay which would have to be made in undertaking and performing the further voyage." It is also shown that, under the charter for the voyage from New York to San Francisco, no consent was given to carry other cargo than that put on board by the charterers, and that the vessel sailed with a full cargo under that charter.

An insurance upon "charter" is an insurance of the risk of losing the freight to be earned under a charter. Where there are two charters, one of them having the same termini as the voyage described in the policy, and the other covering that route and a further continuing route, and the policy merely insures "charter" (which is the present case), and there is no explan'tion between the parties, at the time
327 of effecting the insurance, as to which of the two charters is intended, the policy must be regarded as saying that the charter intended is a charter covering only the route of the voyage described in the policy. This would have been so in the suit brought against the libellants in Maine, but for the parol evidence that was admitted. But for that, Melcher could not have made out the policy issued by the libellants to him to be a policy on the guano charter, and it would, on its face, have been held to be a policy on the charter that was coterminous with the voyage described in the policy.

What parol evidence is there in the present case, as against the respondents, to show that they insured the guano charter? The libel alleges that the vessel having been chartered under the guano charter, and Melcher being interested in said charter and in the primage thereon, the libellants insured him on said charter and on said primage at and from New York to San Francisco, and that the respondents reinsured the same risk so insured by the libellants. It also alleges that the libellants, in insuring "charter," meant the guano charter, and in insuring primage, meant the primage on the guano charter. These allegations mean, and the evidence shows, that the libellants knew, when they insured Melcher, that there was a guano charter and what its terms were. The evidence also shows that the libellants knew, when they in-

sured Melcher, and when they applied to the respondents for insurance, that there was also a charter from New York to San Francisco, under which the vessel was to carry cargo and earn freight, and that the guano charter covered the passage from New York to San Francisco, as well as the route thence to the Chinchas and beyond the Chinchas. All this appears on the face of the letter from Melcher to Sawyer, which was exhibited to the libellants before they insured Melcher on charter and primage. It also appears, from the evidence given in the suit in Maine, that the libellants, in insuring Melcher on charter and primage, expressly agreed, having the knowledge above-mentioned, to
328 insure the guano charter, and meant, by the insurance they made, an insurance on the guano charter. But knowledge of the existence of the guano charter, and of the letter from Melcher to Sawyer, and of the other facts above mentioned as known to the libellants, is not shown to have been possessed by the respondents, or to have been communicated to them by the libellants. It was the duty of the libellants to make known to the respondents, in applying for the reinsurance, all the information possessed by the libellants that was material to the risk. The information so possessed by the libellants, and not communicated to the respondents, is shown by the evidence to have been material to the risk. But the libellants communicated nothing except that they desired an insurance on "charter" and on "primage," "at and from New York to San Francisco," leaving it to be inferred that the charter to be insured was coterminous with the voyage stated.

The libellants, at the same time that they applied to the respondents for insurance on charter and primage at and from New York to San Francisco, applied to them, as before mentioned, to take a war risk only on the same vessel of $5,000, and a separate marine risk on charter of the same vessel for $5,000, "at and from New York to, at, and from San Francisco and Callao to Chinchas;" and the respondents insured those risks. It is urged, on the part of the libellants, that the written applications made to the respondents for these two risks informed them of the guano charter, and informed them sufficiently that the insurance desired in the third application was an insurance on the guano charter. But the information conveyed by the first and second applications was only to the effect that the vessel was going further than to San Francisco, and was, after leaving San Francisco, going to Calloa and the Chinchas, and was to be under charter from New York, on such voyage, as far as Chinchas. Those applications conveyed no information that the charter for any route beyond San Francisco was a charter
329 commencing at New York, or that while it was a different charter from the one under which the vessel was carrying cargo to San Francisco, the two charters covered, both of them, the passage between New York and San Francisco, with cargo to be carried and freight to be earned under the one for that passage, and no cargo to be carried and no freight to be earned under the other for that part of the passage, and that there was a charter covering the carriage of a cargo from the Chinchas to Europe, and that the voyage for the earning of the freight for such carriage was a voyage commencing at New York. No such information was communicated to the respondents, either by those applications, or by any of the letters written by the libellants to the respondents or otherwise. Nor was there anything in those applications or in the letters to put the respondents on inquiry. The information not disclosed is shown to have been material to the risk.

It is shown that the respondents paid to the libellants, in discharge

of the insurance which they made in favor of the libellants of $5,000 marine risk on "charter" of the ship, "at and from New York to, at, and from San Francisco and Callao to Chinchas," the sum of $2,500, in October, 1865, and the further sum of $2,500 in May, 1866. It is strongly urged by the libellants that the fact of this payment is evidence that the respondents knew that in insuring "charter" in the two insurances made on "charter" March 23d, 1864, they were insuring the guano charter. But the suit in Maine against the libellants, brought by Melcher on their insurance of "charter" and primage "at and from New York to San Francisco," was not commenced until September, 1866, and it does not appear that the respondents before that time had any information that Melcher claimed that such insurance covered the guano charter, or that the respondents had before that time heard of the guano charter. As there was not in the insurance by the respondents of $5,000 on charter "at and from New York to, at, and from San
330 Francisco and Callao to Chinchas," any conscious insurance of a charter such as the guano charter was, in view of the other charter from New York to San Francisco, so there was not in the payment of such $5,000 at the time and under the circumstances stated, any conscious recognition of an insurance on such a charter. From the time the suit in Maine was brought by Melcher, setting up that the charter insured by the libellants was the guano charter, the respondents have always contended to the contrary, and have always contended, also, that the guano charter was never insured by the respondents.

The insurance sought to be established in this case is one, on the evidence, of such a character as to require the fullest proof that the underwriters made it with a clear understanding of all the facts and circumstances attending the vessel and her employment and her voyage, and of the liability they were assuming. The face of the policy imports no such insurance, and no insurance of a charter extending beyond San Francisco. Where, as in the case of the insurance on charter by the libellants for Melcher, the insurers assume the risk with a clear knowledge of all the facts, and thus with freedom of choice to accept or reject the risk, and with the ability to fix and exact an adequate premium, the insurance may properly be held to be binding, if the interest insured be an insurable interest. But such clear knowledge and freedom of choice are indispensable. for the system of insurance sought to be upheld in this case is one which would admit of several charters, each of which might include the passage from New York to San Francisco, and each of which might be separately insured, while the vessel would really be earning freight, in carrying cargo from New York to San Francisco, under only one charter. Insurance on "charter" "at and from New York to San Francisco" would cover each one of the charters, and the real interest at risk between New York and San Francisco would be largely over insured under the guise of insuring the transit between those two places as a part of a transit
331 from New York, by the way of San Francisco to places beyond.

The evidence in this case shows that such a system of insurance is one that would not be adopted by underwriters generally, and that no such insurance would be made or acknowledged unless entered upon with full knowledge that it was such an insurance.

It results, from these considerations, that the libel must be dismissed, with costs.

332 *Bill of exceptions.*

United States circuit court for the southern district of New York, in the second district.

THE OCEAN INSURANCE COMPANY, LIBELLANT and ap'ellant,
vs.
THE SUN MUTUAL INSURANCE COMPANY, RESPONDENT and appellee.

This cause came on for trial before the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at a term of the circuit court of the United States in and for the southern district of New York, in the second circuit, on the 13th, 14th, & 17th days of June, 1878, on the appeal by the libellant from the final decree of the district court of the United States for the southern district of New York, dismissing the libel herein with costs.

Counsel for the libellant read the libel, and counsel for the respondent read the answer, as the same were contained in the apostles
333 transmitted from said district court to said circuit court.

Counsel for libellant then put in evidence the testimony taken and the depositions read on behalf of the libellant in the district court, as the same were contained in the apostles, including the exhibits annexed to such depositions and evidence as in said apostles contained, the counsel for libellant reading the direct examination, and the counsel for claimant reading the cross-examination.

The counsel for the respondent then put in evidence the testimony taken and the depositions read on behalf of the respondent in the district court, as the same were contained in the apostles, including the exhibits thereto annexed as in said apostles contained, the counsel for the claimant reading the direct and the counsel for the libellant reading the cross-examination.

In regard to all the testimony and depositions so read in evidence on either side, the counsel for the respective parties interposed the same objections and the court made the same rulings upon such objections as had been made by the district court thereon, as shown by the
334 said apostles and noted therein, and the respective parties excepted to such rulings as in the district court, as noted and recorded in the said apostles.

The counsel for the libellant also put in evidence a certain letter written & sent by the vice-president of the respondent to the president of the libellant, bearing date the 24th day of February, 1864, which was as follows:

[Office of The Sun Mutual Insurance Company, Insurance Buildings, No. 49 Wall street.]

NEW YORK, *February 24th*, 1864.

W. W. WOODBURY, Esq'r,
President Ocean Ins. Co., Portland, Maine:

DEAR SIR: Your favors of the 22d inst. are received with their enclosures as stated. Insurance has been entered for your account in conformity to the returns received, except on the deck cargo for bark C. B. Hamilton, which is not subject to average or under the leakage cause applicable to under-deck cargo. The premium we have charged

is seven per cent., i. e., five times the under-deck rate. Please furnish us your inspector's rate of the brig Young Republic,
335 after receiving in your port repairs of damage caused by her stranding on the coast of North Carolina, bound from Cuba to Portland. When the invoices of her cargo are received, we will have separate amounts on sugar and molasses reported by her.

We are willing that you be not obliged to retain a half of risks, when you do not wish to do so, but we reserve the right to object to amounts returned, which it is not probable will be too great very often.

Your policy is more than $2,000 over in premiums; fill note for its extensions.

Yours, respectfully,

J. WHITEHEAD,
Vice-President.

And thereupon the evidence was closed.

The counsel for the respondent thereupon proposed on its behalf the following findings of fact and conclusions of law to be found by the court, namely:

United States circuit court, southern district of New York.

THE OCEAN INSURANCE COMPANY
336 *vs.*
THE SUN MUTUAL INSURANCE COMPANY.

Respondent's (appellee's) proposed findings of fact and conclusions of law

1. That on or about the 19th of January, 1864, the respondent, a marine insurance company located in the city of New York, issued to the libellant, a marine insurance company located in Portland, Maine, open policy No. 51564, being Exhibit No. 1 returned in the apostles.

2. That afterwards, and on the 30th day of January, 1864, the said policy, by agreement of the parties, was amended so as also to cover such risks as the defendant, respondent, might approve and endorse thereon.

3. That on the 23d day of March, 1864, the respondent received from the libellant a written application to enter on said policy $6,550 on charter, $2,650 on primage, and $1,500 on property on board ship Charles S. Pennell, at and from New York for San Francisco,
337 which application was enclosed in a written letter referring to it as an additional return for insurance on charter, primage, and property on board ship C. S. Pennell for San Francisco only.

4. That thereupon the respondent's vice-president wrote at the foot of the application the word "accepted," and affixed his initials thereto; and the libellant's officers endorsed an entry on the policy in the language of the application.

5. That, at the time of said application and endorsement, the ship Charles S. Pennell was lying in the port of New York, and that George M. Melcher was then her master.

6. That, at that time, two charters had been executed of the same vessel; the one being Exhibit No. 32 in the apostles, dated December 24, 1863, to Sutton & Co., for a voyage from New York to San Francisco, for a full cargo; the other being Exhibit C in the apostles, dated the 30th of January, 1864, to the agents of the Peruvian Government, whereby it was provided that she should sail on before the 1st

338 of June, 1864, to San Francisco, and thence proceed to the port of Callao, in Peru, there to take orders for loading guano at the Chinca Islands, to which place the vessel should at once proceed and load with guano, and take the same to Hamburgh or to Rotterdam.

7. That the vessel had been advertised in New York, under the Sutton charter, as a general ship for San Francisco, and was then taking in cargo for that voyage.

8. That the respondent, at the time of such acceptance being written on said application and of the making of such endorsement, had no knowledge of the existence of the charter for Rotterdam, but was well acquainted with the fact that she was under charter to San Francisco, and had taken previous risks from shippers on cargo taken under that charter.

9. That in writing such acceptance on said application, the respondent understood such application to refer to the said charter to San Francisco, and not to the said charter to Rotterdam.

339 10. That prior to the making of such application, the libellant had insured George M. Melcher, the master, by a written policy dated the 23d day of March, 1864, in the same amounts and language, namely $6,550 on charter, $2,650 on primage, and $1,500 on property on board the ship Charles S. Pennell, at and from New York to San Francisco.

11. That at the time of making such insurance, the agent of Melcher, by whom it was applied for and effected, gave full and detailed information to the president of the plaintiff, of the existence and the terms of the said charter to Rotterdam, and exhibited to the said president Melcher's letter of instruction (Exhibit E in the apostles), in which it was fully and particularly described, as was the charter to San Francisco, from which it was plainly distinguished, and the said president expressly agreed with him by the said policy to cover the said Rotterdam charter, and not the San Francisco charter.

340 12. That in making the said application to the respondent for the said insurance, the libellant did not disclose to the respondent the said letter or the information communicated to him by the said Melcher's agent at the time of his applying for and effecting the insurance with the libellant, or any part thereof, or of the substance thereof, but withheld from the respondent all such information and knowledge.

13. That the knowledge and information so withheld and not disclosed were material to the risk if the libellant intended to obtain an insurance upon the said charter to Rotterdam, or upon any other than the charter to San Francisco, which was known to the respondent and properly described by the words of said application.

14. That on or about the first day of April, 1864, the said vessel set sail from New York to San Francisco, to which port she was bound under her said charter to Sutton & Co. with a full cargo, laden by

341 said charterers, but met with a disaster and put into Rio Janeiro.

15. That, after the happening of said disaster, the libellant represented to the respondent that the risk which it intended to insure by the said application was an interest which it had insured for the said Melcher in the said charter to San Francisco, and that it had not intended to insure thereby any interest in the said charter to Rotterdam.

16. That after the happening of said disaster the said Melcher represented and claimed of the libellant that the insurance which he had

effected with it by the said policy was his interest in the charter to Rotterdam.

17. That the libellant disputed and refused such claim upon the ground that the policy issued by it to him had *as* application to the said Rotterdam charter, but referred to and was intended to apply only to the said charter to San Francisco, and the libellant having in or
342 about the month of April, 1865, given to the respondent notice of the making of such claim, the respondent acquiesced in such dispute and reprisal by the libellant of the same.

18. That thereupon the said Melcher commenced an action against the libellant, in the supreme judicial court of Maine, to recover from the libellant the amount of said insurance made to him as upon his interest in the said Rotterdam charter, and recovered judgment against said libellant thereon for the amount of such insurance, with interest, upon the ground that his agent, at the time of applying for and effecting such insurance had exhibited the said letter, and had communicated to the libellant complete details of the existence and contents of said Rotterdam charter, and that his purpose was to insure his interest in that, and that they had so agreed, and that it should be insured by the said policy issued to him.

19. That in January, 1872, when the said letter and other in-
343 formation was first brought to the respondent's knowledge, it notified the libellant that it would refuse to be bound by any judgment rendered in said action which should be based upon the fact of the exhibition of said letter by Melcher's said agent to the libellant, or upon anything which took place between the president of the libellant and said agent, when the original insurance was applied for by him, inasmuch as none of the said matters were communicated to the respondent at the time of the application for insurance.

20. That the libellant had no interest in the said charter to San Francisco.

21. That the said respondent did not, by writing such acceptance on said application or otherwise, undertake or agree to insure any interest in the said charter to Rotterdam, of which it had no knowl-
344 edge, or in any charter other than that to San Francisco in which the libellant had an interest.

22. That after the recovery of judgment in the said action in Maine by the said Melcher against the said libellant upon the grounds hereinbefore stated, the said libellant for the first time claimed and demanded of and against the respondent that, by accepting and endorsing the said application upon the said policy, the respondent had become insurer to it of the interest which, by its policy to said Melcher, it had been adjudged in said action to have acquired in the said Rotterdam charter, and, upon the refusal of the respondent to recognise or pay such claim, commenced this action to enforce the same.

23. That any and every cause of action which the libellant ever had against the respondent on said policy accrued, if at all, more
345 than six years before the commencement of this action, and it is therefore barred by the statute of the State of New York in such case made and provided.

24. That, in libellant's making and presenting the said application and the respondent's writing such acceptance thereon, the minds of the parties did not meet upon the same thing or subject-matter, the libellant meaning, by the words of said application, the said charter from New York to Rotterdam, which understanding it did not disclose to the respondent, and the respondent meaning, by the said words, the said

charter from New York to San Francisco, and that, by reason of such failure and such mutual mistake, there was no contract entered into between the parties.

25. That the minds of the parties never met upon a contract for insurance upon the charter to Rotterdam.

Respondent's proposed conclusions of law.

346 First. The libellant has failed to prove the contract of insurance between libellant and respondent alleged in the libel.

Second. The libellant has failed to prove any contract between the libellant and respondent under the application or endorsements sued upon, whereby any insurance was effected upon the charter to the agents of the Peruvian Government or upon primage on such charter.

Third. The libellant has failed to prove any loss under the policy sued upon.

Fourth. The libellant has failed to prove any interest in the charter to Sutton & Co.

Fifth. The libellant has failed to prove that at the time of the alleged loss it had any insurable interest in the charter to the agents of the Peruvian Government.

Sixth. The judgment received by Melcher in the supreme court of Maine is not binding upon the respondent herein.

347 Seventh. That judgment does not prove, as against the respondent herein, a loss by libellant under the policy issued by respondent to libellant.

Eight'. That judgment does not prove, as against the respondent herein, any interest of libellant under the policy issued by respondent to libellant.

Ninth. The information in respect to the guano charter, communicated to the libellant's president, by Melcher's agent, on procuring insurance from the libellant, was material to the risk, if libellant intended to obtain insurance from the respondent on that charter.

Tenth. The failure to disclose to the respondent this information, or the substance thereof, upon making its application for insurance, was a material concealment or non-disclosure, making void any insurance which might otherwise have covered such charter.

348 Eleventh. The Ocean Insurance Company, not having an amount on the risk claimed to be covered by the policy sued on, equal to one-half the amount claimed to be covered by respondent's alleged insurance therein, and no notice of that fact or of their desire to avail themselves of the liberty given in the letter of Whitehead, of February 24, 1864, not to retain a half of risks having been given to the respondent prior to the time of the alleged loss, the respondent was not liable upon its alleged insurance on such risk.

Twelfth. The respondent is not liable to the libellant for counsel fees, costs, or expenses upon or in connection with the defense of the action in Maine.

Thirteenth. Any cause of action which may have accrued upon or by reason of the matters alleged in the libel, accrued more than six years before the commencement of this suit.

Fourteenth. Any such cause of action so accruing is barred by the statutes of the State of New York in respect to the limitations

349 of actions.

Fifteenth. Any such cause of action was state' at the time of the commencement of this action.

Sixteenth. The respondent is not liable to the libellant upon the claim set forth in the libel for any amount.

Seventeenth. The decree rendered in the district court dismissing the libel should be affirmed, and the said libel should be dismissed with costs.

EVARTS, SOUTHMAYD & CHOATE,
Proctors for Respondent.

The court filed with the clerk of said court its written opinion in the case, as follows:

WAITE, *Ch. J.:*

The important question which presents itself at the outset of this case is, whether The Sun Company's policy covers the Rotterdam charter. The language is "$6,550 on charter, $2,650 on primage, and $1,500
350 on property on board ship C. S. Pennell, at and from New York to San Francisco." This is to be construed in the light of the circumstances which surrounded the parties when the contract was made. These were:

1. That the Ocean Company did insure that charter, and did not insure any other.
2. That the only interest which that company had in that charter was as insurer.
3. That it had no insurable interest whatever in the San Francisco charter.
4. That The Sun Company, when it took the risk, had full knowledge of the San Francisco charter, and of its general provisions.
5. That the arrangement between the two companies contemplated principally, if not altogether, the reinsurance by The Sun Company, of risks taken by the Ocean.
6. When the risk was taken by The Sun Company, both parties supposed it covered that taken by the Ocean.
351 7. There was no actual fraud on the part of the Ocean Company, and there was no intentional concealment or misrepresentation.

The Maine court decided that the words "at and from New York to San Francisco" were not used to describe the charter insured, but the locality and duration of the risk. In that I fully concur. The opinion of Judge Walton is entirely satisfactory to my mind, and I shall not attempt to add to what he has said. In fact, I do not understand it to be contended now, that if, in reality, the minds of the two companies met upon a contract for the insurance of the Rotterdam charter it may not be proved. The real controversy is, as to whether or not that was the contract, and not as to the admissibility of extrinsic evidence to prove it.

It is quite true that the burden of showing that the risk was
352 taken upon the Rotterdam charter is upon the Ocean Company. There were two charters at risk during the voyage. The language of the policy is equally applicable to both, and it is, therefore, incumbent on the insured to prove to which it actually does relate.

It is not contended that when the risk was taken the letter of Melcher to Sawyer, or the explanations of Sawyer to the Ocean Company, were communicated to The Sun. If there is not enough to charge The Sun Company without this there can be no recovery.

Every contract is, if possible, under the settled rules of construction, to be so interpreted as to give it some effect. If this policy is confined

to the San Francisco charter it can have no effect, as the Ocean Company had no insurable interest in that charter.

There was nothing illegal in the arrangement by which the ship become bound to fill the two charters after leaving New York and
353 before her return. Neither did one of the charters interfere with the other. That to San Francisco did not prevent the ship from going to Callao and the Chinc'as, after discharging her cargo at San Francisco, and that to Rotterdam did not forbid the taking on cargo in New York to be delivered in San Francisco while on the way to the Chinc'as for the guano to be carried to Rotterdam. The Rotterdam charter was satisfied in this particular if the ship left New York by June 1, and was ready to sail from Callao for the Chinc'as within a reasonable time after Dec. 15.

It is clear from the evidence that when the risk was taken by The Sun it knew of the two charters. Knowledge of that to San Francisco is conceded. In fact, this knowledge is made one of the elements of the defence in this action. To my mind, also, knowledge of that to Rotterdam, or, what is equivalent, of some charter to be in ex-
354 istence after the ship left San Francisco, and before she returned from the voyage on which she was about to sail, is equally well established.

The same letter from the Ocean Company, which tendered this risk, tendered another upon a charter expected to be in jeopardy after the ship left San Francisco, otherwise a premium for insurance "at and from San Francisco and Callao and to Chinchas" would not have been paid. This could not have been the San Francisco charter, for all freight under that could have been earned upon the delivery of the cargo at San Francisco. The risk thus tendered was accepted, and the loss when it occurred paid. When the proofs of loss were presented and the payments made, both the president of the Ocean Company, who tendered the risk, and the vice-president of The Sun, who accepted it, were living, and no doubt seems to have been entertained by them that the policy under which the claim was made covered the Rotterdam charter.

355 When the Ocean Company tendered The Sun the risk which is now under consideration, it must have had in mind the Rotterdam charter only, because it had no interest whatever in that to San Francisco. It was seeking indemnity against the liability it had incurred, and that was on account of the Rotterdam charter alone. There cannot be reinsurance if there is not insurance to be insured against.

It remains only to consider whether The Sun Company did, in fact, accept the risk, supposing and having the right to suppose, that it related to the San Francisco charter and not to the Rotterdam.

The application was for reinsurance upon a charter—that is to say, freight to be earned under a charter, to be fulfilled during the voyage upon which the ship was to enter when she sailed from New York.
356 As there were two charters both known to The Sun, that company ought to have understood that the application related to the charter which had already been insured by the Ocean. A policy issued under such circumstances will be presumed to refer to that charter unless a contrary intention is clearly manifested.

Certainly no intention to exclude the Rotterdam charter was manifested in the case. The correspondence which contains all the evidence there is upon the subject previous to the acceptance of the risks, makes no mention directly or indirectly of any other charter. Each of the other applications which accompanied this indicates in the most unmis-

takeable terms, that the voyage upon which the ship was to sail would not end at San Francisco, and that she contemplated other service than that required by her San Francisco charter. Under one of these applications a risk upon the Rotterdam charter was confessedly
357 taken, and in the letter which preceded the acceptance of that risk and upon which it was largely predicated, allusion is made to the present application in terms which indicate very strongly that both referred to the same charter but to different interests. The language is, "I think really, considering you have the risk on the charter, primage, and property to San Francisco at full rates, you should take the war and marine to San Francisco and Chinc'as * * * at six per cent., as there is or will be but little risk in the Pacific after leaving San Francisco." Equally significant was the form of the present application itself. It was added by way of postscript to the letter which transmitted the other, and which, as has just been said, embraced the Rotterdam charter. The words are, "I also enclose an additional return for insurance on charter, primage, & property to San Francisco only." There cannot be a doubt if another charter was intended
358 it would have been so said.

Another important consideration is that the charter to be insured was one upon which the primage was to be $2,650. No San Francisco charter alone could have been expected to furnish such an amount of primage, and taken in connection with the Chincas, as it must be, as a point in the voyage, a guano contract of some kind is clearly indicated.

This much for the evidence of what occurred before the risk was taken. That which happened after is no less significant.

When the loss occurred and the first proofs were made, the officers of the two companies active in taking the risks were alive. No intimation was then given by either that the risk did not cover the loss that was claimed. The only ground of defence put forth by The Sun Company was that there had been over insurance and fraud. To establish this an agent was sent to Rio Janiero for testimony. Cer-
359 tainly if it had not then been supposed by these officers that the policy covered the loss no such trouble would have been taken and no such expense incurred. It is to be borne in mind also that this suggestion of defence came from The Sun Company, and no other seems to have been thought of until after both the president of The Ocean & the vice-president of The Sun were dead, and it was apparent that the evidence was not sufficient to relieve the companies from their responsibility on that ground. Then, for the first time, the counsel suggested that the policies did not cover the Rotterdam charter, and that point was put forward "to defeat the swindling claim." It was not until long after this when, by the extrinsic evidence, the parties were driven to their original defences that The Sun Company claimed to occupy a different position in respect to the case from The Ocean. The
360 risk was taken March 23, 1864. The loss occurred in June following. The parties commenced their correspondence within a proper time thereafter. The loss to Pennell, the owner, was paid in 1865 & 1866. The suit was commenced against The Ocean in Sept. or Oct., 1866. No other defence than over insurance and fraudulent loss was suggested by any one until November, 1869, and then by the counsel in the cause and not the parties. In October, 1870, The Sun Company was fully advised in respect to the extrinsic evidence upon which it was expected The Ocean would be held, and it was not until this evi-

dence was admitted, more than a year afterwards, that it was even hinted by The Sun Company that this altered its own position.

Under all these circumstances I cannot come to any other conclusion than that the policy of The Sun Company covers the Rotterdam charter.

It is, however, further contended that even if the policy does
361 cover the risk, it is void, because The Ocean Company, when it applied for the insurance, concealed from The Sun the fact that no freight was to be earned under the charter until after the arrival of the ship at San Francisco. Such I do not understand to be the fact. As has already been seen it was disclosed in the application that insurance was wanted upon a charter to be operative and in force after the ship left San Francisco. The Sun Company knew that no freight under such a charter could be earned between New York and San Francisco, because the San Francisco charter, as to which it was fully advised, contemplated a full cargo between New York and San Francisco, and ended upon the discharge at the last-named port. The particulars of the Rotterdam charter beyond San Francisco were unimportant, as the risk was to end there. It is not pretended now that the charter was not made or that it was valued for the purposes
362 of the insurance at more than it was worth. No such defence has been put upon the record here, or upon that of the suit in Maine. This objection, therefore, cannot be maintained.

It is next insisted that sufficient proof of the loss has not been made. As has already been seen, The Sun Company was a reinsurer of The Ocean. In effect, The Sun Company guaranted The Ocean against loss by reason of the risk it had taken upon the charter. When the claim for the loss was made upon The Ocean, it was at once referred to The Sun, and that company advised its disallowance. When, in consequence of the refusal of The Ocean Company to pay, suit was commenced, The Sun was promptly notified. The Sun at once took part in the defence, consulted with the counsel and advised as to points to be taken. A judgment, under such circumstances, finding the loss, concludes The Sun Company. Proof of the judgment, therefore, is equivalent
363 to proof of loss.

Again, it is said that there was an utter want of insurable interest in the freight to be earned under the Rotterdam charter before the arrival of the vessel at San Francisco, she being on the route from New York to that point, earning full freight under the San Francisco charter, and the Rotterdam charterers having no interest or concern whatever in the performance of the voyage to San Francisco. This precise point was made in the Maine court. It was specially relied upon by The Sun Company, and even after the counsel had made the objection to the admissibility of the extrinsic evidence, and the president of The Sun Company had seen and perused carefully "the case as made upon the point', he (the president) wrote the counsel pressing the defence, and saying that he thought it the "main question." At the final hearing it was urged upon the attention of the court,
364 and its discussion occupies the principal portion of the opinion of Chief Justice Appleton in disposing of the case. The Sun Company is bound by that judgment, and the question is not now an open one.

The clause in the original policy which required The Ocean Company to insure on the same risk an amount equal to one-half of that covered by The Sun, was waived before the insurance was effected by the letter of The Sun Company, under date of Feb. 24, 1864, which has been put

in evidence since this appeal was taken. The acceptance of the full risk after that date binds The Sun Company.

There is no statute of limitations applicable to courts of admiralty in this class of cases. State claims will not be entertained in that court any more than in equity, and to determine what is state, resort is sometimes had to the limitations in common law actions established by statute, but the statutes themselves are not binding. The court is emphatically a commercial court and requires reasonable promptness on the part of its suitors.

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Here there has been no unnecessary delay. The Ocean Company has been active all the time, and has always proceeded under the supervision and in accordance with the suggestions of The Sun. This suit was commenced in a little more than sixty days after the liability of The Ocean Company was fixed in the very action which The Sun Company had promoted for that purpose, and which until a short time before its termination it had treated as substantially against itself. Under such circumstances a court of admiralty cannot hold that The Ocean Company has lost its rights by delay.

The costs and expenses paid in the suit in Maine are not unreasonable, and they were all incurred under the advice of The Sun. They are therefore recoverable in this action against The Sun as the reinsurer.

Let a decree be prepared in favor of The Ocean Company for payment:

July 19, 1873		4,234 39
" 21, 1873		10,086 55
366 " 23, 1873		1,164 70
In all		15,485 64

with interest from July 21, 1873, at seven per cent. per annum.

And the court also filed the findings of fact and conclusions of law as found by the court in the form following, namely:

Circuit court of the United States, southern district of New York.

THE OCEAN INSURANCE COMPANY, libellant and appellant,
vs.
THE SUN MUTUAL INSURANCE COMPANY.

Facts found by the court.

1. At the several times hereinafter mentioned, the libellant and the defendant were insurance companies engaged in the business of insuring against losses by perils of the sea. The libellant, to be re-

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ferred to herein as The Ocean Company, was incorporated under the laws of the State of Maine, and had its principal place of business at Portland in that State. The defendant, to be referred to as The Sun Company, was incorporated under the laws of the State of New York, and had its principal place of business in the city of New York.

2. On or about January 19, 1864, The Sun Company issued its open policy, No. 51564, to The Ocean Company in the usual form for the insurance of cargoes at and from Cuba to Boston or Portland; it being however expressly understood and agreed that no risk would be taken

under it unless The Ocean Company "take or have an amount on same risk equal to one-half the amount covered by" The Sun Company. On the 9th Feb'y, 1864, it was agreed in writing, noted upon the policy, that the policy should "cover such other risks as this (The Sun) company may approve and endorse" thereon. Under this new ar-
368 rangement the clause limiting the risks to such as The Ocean Company retained an interest in to the extent named, to wit, an amount equal to one-half that of The Sun, was kept in force; but Feb. 24, 1864, the president of The Sun Company wrote to The Ocean Company as follows: "We are willing that you be not obliged to retain a half of risk when you do not wish to do so, but we reserve the right to object to amounts returned, which it is not probable will be too great very often."

A copy of the policy issued, with the endorsements thereon, is printed in the apostles in this case as Exhibit No. 1.

3. This policy was issued with the expectation that it would be used by The Ocean Company for the purposes of reinsurance, an arrangement for such a business on the part of the company having been made.

4. Dec. 24, 1863, Charles S. Pennell, as an owner and agent of
369 the ship C. S. Pennell, of 975 tons burthen, and then lying in the harbor of Portland, Maine, chartered the whole of the vessel, including the state-rooms in cabin not used by the officers, and deck rooms not used for the oven or for sails and stores, to Sutton & Co., for a voyage from New York to San Francisco. No cargo was to be received on board except with the written consent of the charterers, and they were to pay "for the charter or freight" on the good and proper discharge of the cargo in San Francisco, $26,500, less two and one-half per cent. commission. George M. Melcher was at the time master of the ship, and his primage on the freight money, if earned, would have been $1,325. This charter will be referred to as the San Francisco charter.

5. After the making of this charter the vessel sailed from Portland to New York, and was there put up and advertised by Sutton & Co., as a general ship for San Francisco. That firm at that
370 time represented what was known as the Dispatch Line of San Francisco packets.

6. January 30, while the ship was in New York, loading under her San Francisco charter, and advertised for that voyage, her master chartered her again to the Peruvian Government. By the terms of this charter she was to sail from New York on or before June 1, 1864, to San Francisco, and thence proceed, with all convenient dispatch, to Callao, Peru, and from thence, if on inspection she should be found to be well conditioned for the voyage, to the Chincha Islands for a cargo of guano to be taken to Hamburg or Rotterdam. The freight to be paid was at the rate of £4 per ton of 20 cwt. British net weight of guano, subject, however, to a deduction of five shillings per ton, if the vessel was not ready in Callao to proceed to Chinchas by Dec. 15. This charter will be referred to as the Rotterdam charter.

7. On the 5th Feb'y, 1864, while the ship was in New York loading, Charles S. Pennell, a part owner, took from the Ocean Company
371 a policy insuring his interest in the ship for $8,000 against war risks, and his interest in the Rotterdam charter for $8,000 against marine risks on the voyage between New York and the Chinchas. In this policy the duration and locality of the risk was described as "at and from New York, to, at, and from San Francisco, Callao, and the Chinchas."

8. George M. Melcher was at the time owner of one-eighth of the ship, and master. On the 20th March he wrote one Sawyer, his agent, at Portland, advising that the ship was about ready to sail, and directing that insurance be effected on his interest as follows:

War risk to San Francisco, ship	$5,000
Charter to San Francisco, $26,500–⅛	3,300
Primage on same	1,325
Homeward charter from Chinchas, insure out, say, 1,750 tons, at £4 to £7,000, at currency rate of exchange, $52,400, my ⅛	6,550
Primage on same	2,650
Chronometers, Dent, 1883; Negus, 1261	500
And our effects, clothing, &c	1,000
	$19,425

372 In the same letter it was said, "I think you had better put 5 or $6,000 more marine risk in case I should lose the ship."

9. Upon the receipt of this letter Sawyer applied to The Ocean Company for a policy upon the Rotterdam charter, primage and personal effects to San Francisco. In doing so, he exhibited his letter of instructions and explained fully all the circumstances. The risk was accepted and the policy issued March 23, in which the risk was described as follows: "$6,550 on charter; $2,650 on primage; and also $1,500 on property on board ship Charles S. Pennell at and from New York to San Francisco."

10. On the same day The Ocean Company insured the master for $3,000 on his interest in the ship during the whole of her voyage, describing the duration and locality of the risk as "at & from New York to, at, and from San Francisco and Chinchas, with usual liberties at Callao, to her port of advice and discharge in Europe."

373 11. On the same 23d of March, the president of The Ocean Company wrote the vice-president of The Sun as follows:

* * * * I also inclose returns for registry as follows: * * * $5,000 ship C. S. Pennell, to San Francisco and war; $5,000 ~~for~~ of do. * * * *. P. S.—I also enclose an additional return for insurance on charter, primage, and property per ship C. S. Pennell to San Francisco only."

The returns enclosed in this letter were as follows:

"To the Sun Mutual Insurance Company:

"Enter on open policy of this company No. 51564, $5,000 on charter of ship Charles S. Pennell at from New York to, at, and from San Francisco and Callao to Chinchas."

"Rate, three per cent. on board.

"New York, March 23d, 1864.

J. W., *V. P. Ocean Ins. Co.*
Per G. A. W., *Sec'y.*"

"To the Sun Mutual Insurance Company:

"Enter on open policy of this company, No. 51564, war risk only,
374 $5,000 on ship Chas. S. Pennell, at and from New York, to, at, and from San Francisco to Callao to Chinchas."

Rate, three per cent. on board.

New York, March 23d, 1864.

J. W., *V. P. Ocean Ins. Co.*
Per G. A. W, *Sec'y.*

To the Sun Mutual Insurance Company:

Enter on open policy of this company No. 51564, $6,550 on charter, $2,650 on primage, and $1,500 on property, on board ship Chas. S. Pennell, at and from New York to San Francisco, including war risk.

Rate, six per cent. on board.

New York, March 23d, 1864.

J. W., *V. P. Ocean Ins. Co.*
Per G. A. W., *Secy.*

The first and second of these returns were for reinsurance on the risks taken for Charles S. Pennell, and the last on account of the risks taken in favor of the master on the Rotterdam charter and personal property on board, from New York to San Francisco. The risk
375 on the vessel, taken in favor of the master at the same time, was not reported to The Sun Company.

12. Upon the receipt of this letter, with its enclosures, the president of The Sun Company wrote The Ocean Company, under date of March 24, as follows:

"Your favor of the 23d inst. is received, * * * and returns as stated. Those * * * on charter per Chas. S. Pennell, $10,700, in
3 ty thereto. For the marine risk per Chas. S. Pennell to San
o, thence to Callao & Chinchas, our regular tariff rate is four
i half per cent.; the war risk on same is ~~with~~ the same but we
r to enter for both marine and war on $5,000 for four per cent."
a this the president of The Ocean Company replied, under date
c , as follows:

"Your favor of the 24th inst. is received. I think really, considering that you have the risk on charter, primage, and property to San Francisco at full rates, you should take the war and marine to
376 San Francisco and Chinchas on C. S. Pennell at six per cent., as there is or will be but little risk in the Pacific after leaving San Francisco. I can have both risks taken at less than these rates." * * *

14. In response to this the vice-president of The Sun wrote, under date of March 28, as follows:

"Your favor of the 26th inst. is received with a return, * * * which is entered in conformity thereto, as have also been the returns of the 23d inst., per ship C. S. Pennell."

15. The endorsement of these returns upon the open policy was as follows:

1864.	Vessel.	From—	To—
March 23.	Ship Chas. S. Pennell.....	N. Y., San Francisco.....	Callao & Chincha

	Am'ts.	Rates.	Prems.
On charter.....	$5,000.....	3.....	$150 marine

1864.			
March 23.	Ship Chas. S. Pennell.....	N. Y., S. Francisco.....	Callao & Chinchas

	Am'ts.	Rate.	Prems.
On vessel.....	$5,000.....	3.....	$150 war only
" " " New York, San Francisco,	charter, 6,550;	6,393	war & marine
" " " " "	primage, 2,650;	6,159	"
" " " " "	property, 1,500;	6, 90	"

377 16. At the time these returns were made and accepted, the Sun Company had actual knowledge of the San Francisco charter,

and had taken risks on cargo shipped on board the vessel to San Francisco under it.

17. When the returns were made by The Ocean Company to The Sun for acceptance and endorsement, no special mention was made of the Rotterdam charter, and no information was given The Sun Company of what had transpired between The Ocean Company and the agent of the master when the insurance was effected. No allusion was made to the letter of the master to his agent, which was shewn the president of The Ocean in connection with the application to that company, and The Sun Company had no other knowledge of the existence of the Rotterdam charter than such as is to be inferred from the correspondence which preceded the acceptance of the risk.

18. Both the president of The Ocean Company and the vice-presi-
378 dent of The Sun Company are dead. The first-named died in July, 1869, and the last some time before Jan. 1, 1867.

19. The ship sailed from New York to San Francisco about the 1st of April, 1864, having on board a full cargo under the San Francisco charter. Having met with a disaster on the voyage, she put into Rio Janeiro, where she was condemned and sold, and the voyage broken up.

20. The loss under the risk taken in favor of Charles S. Pennell, both on the ship and Rotterdam charter, was paid by The Sun Company, without objection, October 23, 1865, & May 5, 1866.

21. In due time after the loss occurred, the master filed with The Ocean Company his proofs under his policy on account of the Rotter-
dam charter and his primage thereon. These proofs were promptly
379 forwarded by The Ocean Company to The Sun, and no objections to their form were ever made. Payment was refused by The Sun Company on the ground that the master was over insured, and also upon the ground that the ship had been fraudulently cast away, and The Ocean Company was advised not to pay the claim on that account.

22. Pursuant to this advice, payment was refused by The Ocean Company, and, in October, 1866, Melcher, the master, commenced suit upon his policy in the courts of Maine.

23. Of the commencement of this suit notice was immediately given The Sun Company by The Ocean Company, and The Sun Company interested itself in the preparation for defense. An agent of those interested, including another company having a risk upon the voyage, was sent to Rio Janeiro to ascertain the facts in relation to the
380 loss and report. In the meantime the suit upon the policy was suffered to remain in the court without being pressed. At the October term, 1869, the counsel for the plaintiff insisting that something should be done, it was agreed, on behalf of The Ocean Company, that the case should, if possible, be tried at the January term, 1870. In November, or late in October, 1869, the counsel on the part of The Ocean Company visited New York for the purpose of having a personal interview in respect to the case with the officers of The Sun Company. He there met the then vice-president of the company. At the interview which then took place, the points of defence that had been previously suggested by the companies having been discussed, the counsel stated that, in his opinion, they could not be sustained by the evidence, but that he intended to make the point that the Rotterdam charter was
381 not included in the risk as described in the policy. He said, however, that he had been informed by the attorneys who conducted

the case for the plaintiff they had extrinsic evidence which would establish the liability and which they expected to introduce. This extrinsic evidence he considered inadmissible, but at the same time said that if admitted, the defence to the action would undoubtedly fail. He then informed The Sun Company that upon the presentation of the evidence on the trial he should object to its admission, and he had no doubt the presiding judge, under the practice of that State, would take the advice of the supreme court upon that question before proceeding further. If the evidence was ruled out he expected to succeed in his defence, but if admitted he had little hopes. He did not at that time know precisely what the testimony would be, and
382 he did not communicate to the company the particular facts relied upon.

24. At the conclusion of the interview he was instructed by the vice-president of The Sun Company to go forward with the defence, and make every point possible. He was paid at the time one hundred dollars, for which he gave a receipt, as follows:

"NEW YORK, *Nov. 2nd*, 1869.

"Received from The Sun Mutual Insurance Company one hundred dollars, on account of legal expenses and services for defending The Ocean Insurance Company of Portland from claims for loss on charter & primage in case of the ship C. S. Pennell, reinsured by The Sun Mutual Insurance Company for The Ocean Insurance Company.

"JOHN RAND."

25. At the April term, 1870, the cause came on for trial, and the questions were raised upon the admissibility of the extrinsic evidence,
383 and reported to the supreme court for its opinion. The testimony objected to included the deposition of Sawyer, the agent of the insured, as to what transpired between him and The Ocean Company at the time the insurance was effected; the letter from the insured to Sawyer specifying the risk to be taken, and which was submitted to the company by the agent, as showing the authority under which he acted, and also the Rotterdam charter.

26. On the 6th of October, 1870, the attorney of The Ocean Company sent The Sun Company a copy of the case thus made, which contained a statement of the evidence offered and objected to.

In the letter transmitting this document, the attorneys said, "The question now presented to our court is simply whether he (the insured) shall be allowed to put in the testimony. If not allowed, there is an end of the case. If allowed, then we go to trial upon other points of defence."

384 26½. In reply to this the president of The Sun Company wrote as follows:

"NEW YORK, *Oct.* 15, 1870.

"Messrs. J. & E. M. RAND,
"*Portland, Me.:*

"GENTS: Yours of 6th inst. was duly received, also the printed documents which you sent, and which we have perused carefully.

"It is shewn by the testimony that the policy was made in accordance with the application of the plaintiff, and that there was no misunderstanding in relation thereto calling for the admission of evidence outside of the policy to explain it; certainly none would be admissible

to contradict it, for that would be setting up a new contract other than the policy itself which is sued upon.

"It is important, therefore, to have excluded all evidence tend-
385 ing to contradict the policy. By the policy as made the plaintiff insured on charter New York to San Francisco, $6,550; on primage, $2,650; on personal effects, $1,500. There is no such charter shewn, but the plaintiff sets up a charter to San Francisco and ports beyond as described in the charter-party. The insurance of the charter to San Francisco was an insurance of only a part of said charter, not amounting even to a part insurance of the charter, because as the charter-party is to the effect that no money is to be paid by the charterers unless the whole round voyage is performed, and the contract being indivisible if no money was to be paid for the passage to San Francisco, the plaintiff had no insurable interest in that part of the charter; besides, the ship was loaded to her full capacity, and was carrying full freight on said passage outside of the charter, which was covered
386 under special policies. The plaintiff has therefore, by the perils insured against in the policy, suffered no loss beyond what he has already been indemnified for under his policy on freight. The interest of the plaintiff in the passage to San Francisco was therefore an impossible interest. I do not mean to say that he had no interest in the charter-party, but the risk under our policy being only to San Francisco ended before the charter-party could by any possibility be performed. I think, therefore, that the main question is the question of interest, and think that the above reasons will be found sound in law. Please let me hear from you as to your opinion of them, and also as to your line of defence—what your points are—in order that I may be able to form some opinion as to the ultimate issue of the suit.

"Yours, respectfully,

387 "(Signed) "J. P. PAULISON,
"*President.*"

27. In or about January, 1872, the supreme court decided that the testimony was admissible, and on the 16th of that month the attorneys advised The Sun Company of the result, and sent a copy of the opinion delivered. They also said that the case would probably come up again for hearing in a week or two, and asked that papers of any kind relating to the defence in the possession of The Sun Company might be forwarded to them at once.

28. Upon the receipt of this last letter the case was submitted by The Sun Company to its counsel in New York, who gave his opinion in writing to the effect "that The Sun Mutual Insurance Company's liability under the reinsurance policy cannot be extended be-
388 yond the obvious import of the terms in which it is expressed. The letter of Melcher ordering the insurance not having been exhibited to them nor the explanations of Sawyer made to them they cannot be affected by them; and hence, if the admission of extrinsic evidence as to what took place between Sawyer and The Ocean Company when the original insurance was made varies the case as between that company and Melcher from what it appears to be on the face of the original policy, I cannot see that it is a matter that concerns The Sun Company."

29. Jan. 29 a copy of this opinion was forwarded by The Sun Company to the attorneys in Portland, and attention called to its contents.

30. At the January term, 1872, the cause was again tried, and
389 the testimony being all in, the case was withdrawn from the

jury and submitted to the court to enter such judgment as law and the evidence required. The point was directly made by The Ocean Company that the policy never attached, because the ship never actually or legally sailed under the Rotterdam charter.

31. On the 12th July, 1872, the case having been printed, a copy was sent by the attorneys in Portland to The Sun Company, with a statement that the cause would come on for argument before the full bench in a few days. Permission was also asked to draw on the company at sight for five hundred dollars on account of fees and disbursements.

31½. On the 5th July The Sun Company replied, denying
390 its liability to pay fees, and saying that, "as the suit is against The Ocean Company and not against us, you must look to them for your fees." It is also said in the letter that when the payment of $100 was made, in Nov., 1869, the case as subsequently developed was not fully understood.

32. A judgment was afterwards rendered in the suit against The Ocean Company for $9,200, and interest from April 27, 1865.

33. This judgment was satisfied by payments of The Ocean Company, as follows:

July 19, 1873	$4,234 29
July 21, 1873	10,086 55

32. The costs in the action which were included in the payment were $574.17.

391 33. The account of the counsel in the cause for their professional services and disbursements, over and above the $100 paid by The Sun Company, was $1,164.70. This was also paid by The Ocean Company July 23, 1873, and was reasonable.

34. Payment of the amount of the judgment and the account for counsel fees was duly demanded of The Sun Company before the commencement of this suit, and refused.

CONCLUSIONS OF LAW.

1. The Sun Company's policy covers the Rotterdam charter.

2. The policy is not void because of any concealment by The Ocean Company.

3. The judgment in the Maine court against The Ocean Com-
392 pany is conclusive upon the issues there made and decided, and binds The Sun.

4. This action is not barred either by the statute of limitations or by lapse of time.

5. The Sun Company is bound in law to reimburse The Ocean for moneys expended on account of counsel fees, and the costs and expenses in defending the suit in the Maine court.

6. The libellant is entitled to a decree against the defendant for—

1. Am't paid in satisfaction of the Maine judgment	$14,320 84
2. Am't paid for counsel fees, expenses, &c	1,164 70
In all	$15,485 54

With interest from July 21, 1873, and the costs in both courts.

WAITE, *Ch. J.*

And the court refused to find the respondents' requests to find
393 and each of them not found in the findings of the court; and

thereafter, upon notice and before judgment or decree, counsel for respondent filed in the office of said clerk, and served upon the libellant's proctors, exceptions to said findings of the court, and to the refusals of the court to find as follows:

United States circuit court, southern district of New York, in the second circuit.

THE OCEAN INSURANCE COMPANY, LIBELLANT and appellant,
vs.
THE SUN MUTUAL INSURANCE COMPANY, respondent and appellee.

The said Sun Mutual Insurance Company, respondent and appellee, excepts to the findings of fact and conclusions of law found and filed by the circuit court, as follows, to wit:

394 1. To the finding of fact that the policy in suit was issued with the expectation that it would be used by the Ocean Company for the purpose of reinsurance, and to the finding of fact that an arrangement for such a business on the part of the company had been made.

2. To the finding of fact that in the policy issued by the Ocean Company to Charles S. Pennell, insuring his interest in the ship and in the Rotterdam charter for $8,000, the words "at and from New York" to "at and from San Francisco, Callao and Chinchas," were a description of the duration and locality of the risk.

3. To the finding of fact that the first and second of the returns set forth in the eleventh finding of fact were for reinsurance on the risks taken for Charles S. Pennell, and to the finding of fact that the last of said returns was on account of the risk taken in favor of the master on the Rotterdam charter and personal property on board from New York to San Francisco.

395 4. To the finding of fact at the time the returns specified in the eleventh finding of fact were made and accepted the respondent The Sun Company had actual knowledge of the San Francisco charter, and to the finding of fact that it had taken risks on cargo shipped on board the vessel to San Francisco under said charter.

8. To the finding of fact that any knowledge in the respondent of the existence of the Rotterdam charter is to be inferred from the correspondence which preceded the acceptance of the risk.

6. To the finding of fact that the ship having met with a disaster on the voyage, and having put into Rio Janeiro, was there condemned and sold and the voyage broken up.

7. To the finding of fact that the loss under the risk taken in favor of Charles S. Pennell, both on the ship and the Rotterdam char-
396 ter, was paid by The Sun Company without objection October 23rd, 1865, and May 5, 1866.

8. To the finding of fact that the proofs filed with the Ocean Company by the master under his policy on account of the Rotterdam charter and his primage, thereon were forwarded by the Ocean Company to The Sun Company, and to the finding of fact that no objections to their form were ever made.

9. To the finding of fact that payment was refused by The Sun Company on the ground that the master was overinsured, and also upon the ground that the ship had been fraudulently cast away, and to the finding of fact that the Ocean Company was advised not to pay the claim on that account.

10. To the finding of fact that pursuant to this advise payment was refused by the Ocean Company.

11. To the finding of fact that notice of the commencement of the suit by the master against the Ocean Company in Maine was
397 given The Sun Company by the Ocean Company, and to the finding of fact that The Sun Company interested itself in the preparation for defence.

12. To the finding of fact that in the interview between the counsel of the Ocean Company and the vice-president of The Sun Company in New York, mentioned in the 23d finding of fact, counsel for said Ocean Company, stated that he had been informed by the attorneys who conducted the case for the plaintiff that they have extrinsic evidence which would establish the liability which they expected to introduce, and to the finding of fact that at such interview he stated that if such extrinsic evidence were admitted the defence to the action would undoubtedly fail.

13. And to the finding of fact that in such interview the counsel for The Ocean Insurance Company stated that if the evidence were ruled out he expected to succeed in his defence, but if admitted he
398 had little hopes.

14. To the finding of fact that at the conclusion of the interview he was instructed by the vice-president of The Sun Company to go forward with the defence and make every point possible.

15. To the finding of fact that at the final trial of the case in the supreme court in Maine against the Ocean Company at the January term of 1872 the point was directly made by the Ocean Company that the policy never attached, because the ship never actually or legally sailed under the Rotterdam charter.

16. To the finding of fact that the account of the counsel in the cause in Maine being $1,164.70 over and above the $100 paid by The Sun Company was reasonable.

17. To the finding of fact that payment of the amount of the judgment and the account for counsel fees was demanded of The Sun
399 Company by the Ocean Company before the commencement of this suit.

And the said respondent and appellee further excepts:

18. To the conclusion of law that The Sun Company's policy covers the Rotterdam charter.

19. To the conclusion of law that the policy is not void because of any concealment by the Ocean Company.

20. To the conclusion of law that the judgment in the Maine court against the Ocean Company is conclusive upon the issue there made and decided, and binds the respondent, The Sun Company.

21. To the conclusion of law that this action is not barred either by the statute of limitations or by lapse of time.

22. To the conclusion of law that The Sun Company is bound in law to reimburse the Ocean Company for moneys expended on account
400 of counsel fees and the costs and expenses in defending the suit in the Maine courts, and—

23. To the conclusion of law that the libellant is entitled to a decree against the defendant for $15,485.54, with interest, from July 21, 1873, and the costs in both courts, or for any amount whatever.

The said respondent and appellee further excepts:

1. To the refusal of the court to find, as requested, that the respondent, at the time of accepting the risk in suit and endorsing the same on

said policy, had no knowledge of the existence of the Rotterdam charter.

2. To the refusal of the court to find as requested that in writing such acceptance of said risk on the application and endorsing the same on the policy the respondent understood such application to refer to the said charter to San Francisco, and not to the said Rotterdam charter.

3. To the refusal of the court to find as requested that in
401 making the application for the said insurance the libellant did not disclose to the respondent the letter of Melcher or the information communicated to him by the said Melcher's agent at the time of his applying for and effecting the insurance with the libellant or any part thereof or the substance thereof, but withheld from the respondent all such information and knowledge.

4. To the refusal of the court to find, as requested, that the knowledge and information so withheld and not disclosed were material to the risk of the libellant intended to obtain an insurance upon the said charter to Rotterdam, or upon any other than the San Francisco charter, which was known to the respondent, and properly described by the words of said application.

5. To the refusal of the court to find, as requested, that after the happening of the disaster the libellant represented to the re-
402 spondent that the risk which it intended to insure by the said application was an interest which it had insured for the said Melcher in the said charter to San Francisco, and that it had not intended to insure thereby any interest in the said charter to Rotterdam.

6. To the refusal of the court to find as requested, that upon Melcher's claiming of the libellant that the insurance which he had effected with it by his policy, was his interest in the Rotterdam charter, the libellant disputed and refused such claim upon the ground that the policy issued by it to him had no application to the Rotterdam charter, but referred to and was intended to apply only to the said San Francisco charter.

7. To the refusal of the court to find as requested, that the libellant having, in or about the month of April, 1865, given to the respondent notice of the making of such claim, the respondent acquiesced
403 in such dispute and refusal by the libellant of the same.

8. To the refusal of the court to find as requested, that the said Melcher recovered judgment against the libellant in his action in Maine, for the amount of his insurance, with interest, upon the ground that his agent, at the time of applying for and effecting such insurance, had exhibited the said letter of Melcher, and had communicated to the libellant complete details of the existence and contents of said Rotterdam charter, and that his purpose was to insure his interest in that, and that they, the Ocean Company, had so agreed, and that it should be insured by the said policy issued to him.

9. To the refusal of the court to find as requested, that the said letter and other information to the Ocean Company, upon the strength of which the said Melcher recovered judgment against them was
404 first brought to the respondent's knowledge in January, 1872.

10. To the refusal of the court to find as requested, that upon receiving such information and knowledge of such letter the respondent notified the libellant that it would refuse to be bound by any judgment rendered in the said action which should be based upon the fact of the exhibition of said letter by Melcher's said agent to the libellant, or upon anything which took place between the president of the libel-

lant and said agent, when the original insurance was applied for by him, inasmuch as none of the said matters were communicated to the respondent at the time of the application for insurance by him.

11. To the refusal of the court to find as requested, that the libellant had no interest in the said San Francisco charter.

405 12. To the refusal of the court to find, as requested, that the respondent did not, by writing its acceptance on the application or otherwise, undertake or agree to insure any interest in the said Rotterdam charter of which it had no knowledge or in any charter other than the San Francisco charter in which the libellant had no interest.

13. To the refusal of the court to find, as requested, that after the recovery of judgment in the said action in Maine by the said Melcher against the said libellant upon the grounds hereinbefore stated, the said libellant for the first time claimed and demanded of and against the respondent that by accepting and endorsing the said application upon the said policy the respondent had become insurer to it of the interest, which, by its policy to said Melcher, it had been adjudged in the
406 said action to have acquired in the said Rotterdam charter, and upon the refusal of the respondent to recognise or pay such claim, commenced this action to enforce the same.

14. To the refusal of the court to find, as requested, that any and every cause of action which the libellant ever had against the respondent on said policy accrued, if at all, more than six years before the commencement of this action, and is therefore barred by the statute of the State of New York in such case made and provided.

15. To the refusal of the court to find as requested, that in libellant's making and presenting the said application, and the respondent's writing such acceptance thereon, the minds of the parties did not meet upon the same thing or subject-matter, the libellant meaning by the words of said application the said charter from New York to Rotterdam, which understanding it did not disclose to the respondent,
407 and the respondent meaning by the said words the said charter from New York to San Francisco, and that, by reason of such failure and such mutual mistake, there was no contract entered into between the parties.

16. To the refusal of the court to find as requested, that the minds of the parties never met upon a contract for insurance upon the charter to Rotterdam.

And the said respondent further excepts to the refusal of the court to find as requested as conclusions of law, as follows:

1. To the refusal of the court to find as conclusion of law that the libellant has failed to prove the contract of insurance between libellant and respondent alleged in the libel.

2. To the refusal of the court to find as conclusion of law that the libellant has failed to prove any contract between the libellant and respondent under the application or endorsement sued upon,
408 whereby any insurance was effected upon the charter to Rotterdam, or upon primage on such charter.

3. To the refusal of the court to find as conclusion of law that the libellant has failed to prove any loss under the policy sued upon.

4. To the refusal of the court to find as conclusion of law that the libellant has failed to prove any interest in the San Francisco charter.

5. To the refusal of the court to find as conclusion of law that the libellant has failed to prove that, at the time of the alleged loss, it had any insurable interest in the Rotterdam charter.

6. To the refusal of the court to find as conclusion of law that the judgment recovered by Melcher in the supreme court of Maine is not binding upon the respondent herein.

7. To the refusal of the court to find as conclusion of law that
409 that judgment does not prove, as against the respondent herein, a loss by libellant under the policy issued by respondent to libellant.

8. To the refusal of the court to find as conclusion of law that that judgment does not prove, as against the respondent herein, any interest of libellant under the policy issued by respondent to libellant.

9. To the refusal of the court to find as conclusion of law that the information in respect to the Rotterdam charter communicated to the libellant's president by Melcher's agent on procuring insurance from the libellant was material to the risk, if libellant intended to obtain insurance from the respondent on the charter to Rotterdam.

10. To the refusal of the court to find as conclusion of law that the failure to disclose to the respondent this information, or the sub-
410 stance thereof, upon making its application for insurance, was a material concealment or non-disclosure, making void any insurance which might otherwise have covered such charter.

11. To the refusal of the court to find as conclusion of law, that the Ocean Insurance Company not having an amount on the risks claimed to be covered by the policy sued on equal to one-half the amount claimed to be covered by respondent's alleged insurance thereon, and no notice of that fact or of their desire to avail themselves of the liberty given in the letter of Whitehead, of February 24, 1864, not to retain a half of risks having been given to the respondent prior to the time of the alleged loss, the respondent was not liable upon its alleged insurance on such risk.

12. To the refusal of the court to find as conclusion of law, that the respondent is not liable to the libellant for counsel fees, costs, or
411 expenses upon or in connection with the defence of the action in Maine.

13. To the refusal of the court to find as conclusion of law, that any cause of action which may have accrued upon or by reason of the matters alleged in the libel, accrued more than six years before the commencement of this suit.

14. To the refusal of the court to find as conclusion of law, that any such cause of action so accruing is barred by the statutes of the State of New York in respect to the limitations of actions.

15. To the refusal of the court to find as conclusion of law that any such cause of action was stated at the time of the commencement of this action.

16. To the refusal of the court to find as conclusion of law, that the respondent is not liable to the libellant upon the claim set forth in the libel for any amount.

17. To the refusal of the court to find as conclusion of law that
412 the decree rendered in the district court dismissing the libel should be affirmed, and the said libel should be dismissed, with costs.

EVARTS, SOUTHMAYD & CHOATE,
Proctors for Respondent.

And thereafter a final decree was made by the court reversing the decree of the district court, and awarding judgment in favor of the libellants, including $1,048.77 costs, for the sum of twenty-one thousand

nine hundred and ninety-three dollars and seventy-two cents, and inasmuch as the said several matters produced and given in evidence on the trial in said circuit court, and by counsel for said respondent objected and insisted on, and the said exceptions do not appear by the record of the decree of said court, the counsel for said respondent has prepared and caused the bill of exceptions to be settled as a
413 record thereof, according to the form of the statute in such case made and provided, and the practice of the court, and to be signed and ordered on file.

M. R. WAITE.

414 (Indorsed:) United States circuit court, southern dist. of New York, in the second circuit. The Ocean Ins. Co., libellant and appellant, vs. The Sun Mutual Ins. Co., respondent and appellee. Bill of exceptions. Evarts, Southmayd & Choate, proctors for respondent, 52 Wall street, New York. U. S. circuit court. Filed Oct. 14, 1878. John I. Davenport, clerk.

415 At a stated term of the circuit court of the United States for the southern district of New York, held at the city of New York on the 10th of July, 1878.

Present, the honorable Morrison R. Waite, Chief Justice.

THE OCEAN INSURANCE COMPANY, LIBELLANT & appellant,
vs.
THE SUN MUTUAL INSURANCE COMPANY.

The appeal in this cause coming on to be heard on the pleadings and proofs, and having been argued by counsel for the respective parties, and due deliberation having been had:

416 Now, on motion of Benedict, Taft & Benedict, libellant's proctors, it is ordered, adjudged, and decreed that the decree of the district court herein, dismissing the libel, be reversed, and that the libellant herein recover of the respondent herein the sum of fifteen thousand four hundred and eighty-five dollars and fifty-four cents
15,485.54 ($15,485.54), with interest thereon at seven per cent. per annum from July 21st, 1873, to the date of this decree, which is
5,389.41 five thousand three hundred and eighty-nine dollars and forty-one cents (5,389.41), together with its costs in the district court,
264.37 which have been taxed at two hundred and sixty-four dollars and thirty-seven cents, and its costs in the circuit court which
784.40 have been taxed at seven hundred and eighty-four dollars and forty cents,
21,923.72 Making in all the sum of twenty-one thousand nine
417 hundred and twenty-three dollars and seventy-two cents, and that judgment for that sum be entered in favor of The Ocean Insurance Company, libellant, against The Sun Mutual Insurance Company, respondent.

And it is further ordered and decreed that, unless an appeal be taken from this decree within the time limited by the rules and practice of this court, the libellant have execution to enforce this decree.

M. R. WAITE.

418 *Affidavit of service.*

U. S. circuit court.

OCEAN INSURANCE CO.
against
SUN MUTUAL INSURANCE COMPANY.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Joseph P. Bickford, of the said district, being duly sworn, doth depose and say that he did, on the third day of October, in the year one thousand eight hundred and seventy-eight, serve Evarts, Southmayed & Choate, esq., resp't's proct's in the above-entitled action, with a final decree and notice of settlement, of which the annexed is a copy, by delivering the same to a clerk in their office, having charge thereof during their absence.

JOSEPH P. BICKFORD.

Sworn to before me this 3d day of October, 1878.
[L. S.] WM. D. JONES,
Notary Public for Kings Co.

Certified in N. Y. Co.

419 GENT'N: Please take notice that we shall present the foregoing decree for settlement to his honor Judge Waite on the 4th day of October, 1878, at the court-rooms of the U. S. circuit court, New York post-office building, at the opening of court, or as soon as counsel can be heard.

Oct. 3, '78.

Yours, &c.,

BENEDICT, TAFT & BENEDICT,
Lib'l't's Proctors.

To EVARTS, SOUTHMAYED & CHOATE, Esq.,
Resp'd't's Proctors.

(Endorsed:) U. S. circuit court. Ocean Insurance Co., lib'l't & appel't vs. Sun Mutual Insurance Co., resp'd't. Final decree. Ben-
420 edict, Taft & Benedict, lib'l't's proctors, 64 Wall st., New York. U. S. circuit court. Filed Oct. 14, 1878. John I. Davenport, clerk.

421 Supreme Court of the United States.

THE SUN MUTUAL INSURANCE COMPANY,
defendant and appellant,
vs.
THE OCEAN INSURANCE COMPANY, LIBELLANT
and appellee.

To the honorable the Supreme Court of the United States:

The appeal of The Sun Mutual Insurance Company, the above-named appellant, respectfully shows:

That on or about the 24th day of September, 1873, the above-named libellant and appellee, The Ocean Insurance Company, exhibited its libel in the district court of the United States for the southern district of New York, against the above-named defendant and appellant,

The Sun Mutual Insurance Company, claiming over five thousand dollars, to wit, the sum of sixteen thousand dollars, exclusive of costs, and praying, among other things, that the said defendant and appellant be compelled to pay the said libellant said claim and costs, as on reference to said libel will more fully appear; that thereupon process was issued to the marshal of the United States for the southern district of New York, and thereafter this appellant appeared, and on or about the 13th day of November, 1873, filed its answer to said libel praying for the reasons therein set forth that said libel be dismissed with costs in that behalf, as by reference thereto will more fully appear; that thereafter, and on or about the 25th, 29th, 30th, and 31st days of March, 1875, the said cause came on to be heard before the Hon. Samuel Blatchford, judge of the said district court, upon the pleadings and proofs introduced by the respective parties, and the said judge having advised thereon, on or about the 4th day of January, 1876, made a final decree in said cause, whereby it was ordered and adjudged that the said libel be dismissed with costs.

That after said final decree the said libellant, The Ocean Insurance Company, appealed from the said decree to the circuit court of the United States for the southern district of New York, and the said cause was removed thereby into the said circuit court, and their tried anew, and such proceedings were had in said circuit court that afterwards the said circuit court made a final decree in said cause, bearing date the 10th day of July, 1878, whereby it was decreed that the said decree of the district court be reversed, with costs, and that the said libellant recover of this appellant herein the sum of twenty-one thousand nine hundred and twenty-three dollars and seventy-two cents, and that judgment for that sum be entered in favor of the said libellant against this appellant, and that unless an appeal be taken from said decree within the time limited by the rules and practice of said circuit court the said libellant should have execution to enforce said decree, which said decree of the said circuit court is, as this appellant is advised, erroneous, and ought to be reversed.

Wherefore this appellant appeals from the whole of said decree of said circuit court to the Supreme Court of the United States, and respectfully prays that the decree of the said circuit court and the libel, answer, pleadings, depositions, evidence, and proceedings in the said cause may be sent to the Supreme Court of the United States without delay, and that the said Supreme Court will proceed to hear the said cause anew, and that the said decree of the circuit court, and every part thereof, may be reversed and a decree made dismissing the said libel with costs, or such other decree as to the said Supreme Court shall seem just.

New York, November 11, 1878.

EVARTS, SOUTHMAYD & CHOATE,
Appellant's Proctors.

CHARLES H. TWEED,
Advocate.

(Endorsed:) U. S. Supreme Court. The Sun Mutual Insurance Company, appellant, vs. The Ocean Insurance Company, appellee. Appeal. Evarts, Southmayd & Choate, appellant's proctors.

Due and timely service of a copy of within appeal is hereby admitted.

BENEDICT, TAFT & BENEDICT,
Appellee's Proctors.

U. S. circuit court. Filed Nov. 25, 1878. John I. Davenport, clerk.

427 United States circuit court, southern district of New York.

THE OCEAN INSURANCE COMPANY
vs.
THE SUN MUTUAL INSURANCE COMPANY.

It is hereby stipulated and agreed that upon the appeal by the defendant, The Sun Mutual Insurance Company, to the Supreme Court of the United States from the decree of the circuit court herein, the said defendant may deposit to the credit of this cause in the United States *States* Trust Company, thirty thousand dollars in the coupon bonds of the United States commonly known as 10-40s, as security that the said defendant will pay all costs and damages & interest which
E. S. & C. B. T. & B. may be awarded against it upon said appeal, and also as
428 security that if the said decree of the circuit court, or any part thereof, be affirmed the said defendant will pay the amount directed to be paid by said decree, or the part thereof as to which the said decree shall be affirmed, if affirmed only in part, and that said deposit (to be evidenced by the service on the libellant's proctor and the filing in the office of the clerk of this court of a certificate of said trust company that such deposit has been made in accordance with this stipulation) shall render the appeal of said defendant effectual for every purpose, and shall stay the execution of said decree in the same manner and with the like effect as if good and sufficient security were given in the usual form and as required by law to procure a stay of execution upon such appeal.

429 And it is further stipulated and agreed that in case of the affirmance of said decree; either in whole or in part, if the said defendant shall not within ten days after notice to its proctors of the entry of the decree in this court to be entered on the mandate of the Supreme Court therein, pay the said decree so affirmed, or the part thereof as to which the same shall have been affirmed, if affirmed only in part,
E. S. & C. B. T. & B. and any judgment recovered by said appellee for costs and damages & interest on said appeal, then the said appellee may apply to this court, on two days' notice to the proctors for the defendant herein, for an order directing that the said trust company shall sell so many of said bonds as may be sufficient to pay the said decree, or the part thereof as to which the same shall have been
430 E. S. & C. B. T. & B. affirmed, and also such costs and damages & interest upon such appeal, and the next proceeds of such sale shall be applied to the payment of such decree, or the part thereof as to which the same may have been affirmed, and such costs and
E. S. & C. B. T. & B. damages & interest as may have been recovered by said appellee upon such appeal, and the overplus, if any, shall be rendered, and such of said bonds as shall not have been sold for the purpose aforesaid, if any, shall be redelivered to the defendant herein.

And it is further stipulated and agreed that on the payment of the decree in this cause before affirmance, or of the amount in respect to which the same shall have been affirmed, if affirmed by said Supreme
E. S. & C. B. T. & B. Court, either in whole or in part, with such costs and damages & interest as may have been recovered by said ap-
431 pellee on such appeal, the said bonds shall be redelivered to the said defendant; that in the meantime and until the determination of said Supreme Court on such appeal the interest coupons upon said bonds, as the same become due and payable, shall be cut off by said trust company, and delivered to the defendant.

E. S. & C.
B. T. & B.

Any expense or loss arising out of the deposit to be borne by The Sun Mutual Insurance Company.

EVARTS, SOUTHMAYD & CHOATE,
Proctors for App'l'ts.
BENEDICT, TAFT & BENEDICT,
Resp'd's Procts.

(Endorsed.) U. S. circuit court, southern district of New York. The Ocean Insurance Company vs. The Sun Mutual Ins. Co. Stipulation. Evarts, Southmayd & Choate, defendant's proctors. U. S. circuit court. Filed Nov. 27, 1878. John I. Davenport, clerk.

432 [Issued in triplicate.]

NEW YORK, *November* 11, 1878.

United States circuit court, southern district of New York.

THE OCEAN INSURANCE CO.
vs.
THE SUN MUTUAL INSURANCE CO.

The United States Trust Co., of N. Y., acknowledges herewith the deposit with said company of thirty thousand dollars of coupon bonds of the United States, known as "ten-forties," with coupons due March 1st, 1879, and thereafter attached; said bonds being numbered 84969–'71, 84973–'5, 84963, 23592–'3, 22906–'9, 122267, 125979, 126189, 128273, 128331–'6, 74398–'401, & 82759–'61, inc., being 30 bonds of one thousand dollars each. The bonds as above described are to be held by the United States Trust Co. in accordance with the terms of an agree-
433 ment entered into by the parties to the above action, a copy of which agreement is filed with the said bonds.

JOHN A. STEWART,
President.

W. DARROW, *Sec'ty.*

(Endorsed:) U. S. circuit court, so. district of New York. The Ocean Insurance Company vs. The Sun Mutual Insurance Company. Receipt from U. S. Trust Co. for bonds deposited with it to secure appeal.

Due service of a duplicate original of within original certificate or receipt is hereby admitted.
Dated New York, Nov. 11, 1878.

BENEDICT, TAFT & BENEDICT,
Proct's for Appellees.

U. S. circuit court. Filed Nov. 27, 1878. John I. Davenport, clerk.

434 By the honorable Samuel Blatchford one of the judges of the circuit court of the United States for the southern district of New York in the second circuit.

To the Ocean Insurance Company:

Whereas, The Sun Mutual Insurance Company has lately appealed to the Supreme Court of the United States from a decree lately rendered in the circuit court of the United States for the southern district of New

York in the second circuit in favor of you the said The Ocean Insurance Company against the said The Sun Mutual Insurance Company, stating that the said decree is erroneous and ought to be reversed and praying that the said decree and every part thereof may be reversed and a decree made dismissing the libel in and by said decree in the circuit
435 court sustained and allowed; and the said The Sun Mutual Insurance Company having duly entered its said appeal to the Supreme Court of the United States and given good and sufficient security that it will pay all costs and damages and interest which may be awarded against it upon said appeal, and also that if said decree of the circuit court or any part thereof be affirmed the said The Sun Mutual Insurance Company will pay the amount directed to be paid by the said decree or the part thereof as to which the said decree shall be affirmed if affirmed only in part, you are therefore hereby cited to appear before the said Supreme Court, at the city of Washington, in the District of Columbia, on the second Monday of October next, to do and receive what may appertain to justice to be done in the premises.

436 Given under my hand at the city of New York, in the southern district of New York, in the second circuit, this 27th day of November, in the year of our Lord eighteen hundred and seventy-eight, and of the Independence of the United States the one hundred and third.

SAM'L BLATCHFORD,
Circuit Judge.

Due and timely service of the foregoing citation is hereby admitted. Dated New York, November 29, 1878.

BENEDICT, TAFT & BENEDICT,
Resp't's Proctors.

(Endorsed:) U. S. Supreme Court. The Sun Mutual Insurance Company, appellant, vs. The Ocean Insurance Company, appellee. Citation. Evarts, Southmayd & Choate, appellant's proctors. U. S. circuit court. Filed Nov. 30, 1878. John I. Davenport, clerk.

437 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, John I. Davenport, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, do hereby certify that the foregoing pages, numbered from one to four hundred and thirty-six, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of The Sun Mutual Insurance Company, defendant and appellant, against The Ocean Insurance Company, libellant & appellee, as the same remain of record and on file in said office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this sixth day of August, in the year of our Lord one thousand eight hundred and seventy-nine, and of the Independence of the said United States the one hundred and fourth.

[SEAL.] JOHN I. DAVENPORT, *Clerk.*

(Indorsement on cover:) No. 119. The Sun Mutual Insurance Company, appellant, vs. The Ocean Insurance Company. S. New York. C. C. U. S. Filed 22d October, 1879.

17-485

OFFICE SUPREME COURT U.S.
FILED
DEC 1882
JAMES H. MCKENNEY, CLK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1882.—No. 119.

THE SUN MUTUAL INSURANCE COMPANY,
Appellant,

vs.

THE OCEAN INSURANCE COMPANY,
Respondent.

BRIEF AND ARGUMENT FOR APPELLANT.

WM. M. EVARTS,
Of Counsel.

Supreme Court of the United States.

THE SUN MUTUAL INSURANCE COMPANY,
Appellant,

vs.

THE OCEAN INSURANCE COMPANY,
Respondent.

October Term, 1882,
No. 119.

Case.

The Ocean Insurance Company, of Portland, Maine, filed a libel in Admiralty in the District Court, before Judge Blatchford, on a policy of insurance against the Sun Mutual Insurance Company, of New York.

Upon the hearing in the District Court the libel was dismissed, upon the ground that the Sun Company never incurred the risk upon which the loss was claimed. The reasons for this decision of the District Court are given at length in the opinion of Judge Blatchford.

Opinion, Record, pp. 169–179.

Upon the appeal of the Ocean Company the cause was heard before Mr. Chief Justice Waite, holding the Circuit

Court, and the decree of the District Court was reversed and a decree given for the Ocean Company for the full loss.

The findings of fact in the Circuit Court exhibit as succinctly as possible the proofs making up the view of the facts taken by the Circuit Court.

Rec., pp. 189–196.

The conclusions of law by the Circuit Court held:

> That the policy of the Sun Company covered the risk upon which the loss was claimed.
>
> That it was not void by reason of any concealment by the Ocean Company in effecting the insurance with the Sun Company.
>
> That the defense of no intent upon the part of the original assured in the subject insured, and the requirement of proof of the loss are not open to the Sun Company in this cause, as the Sun Company is concluded by a judgment of the court in Maine against the Ocean Company at the suit of the original assured.
>
> That the suit is not barred by the Statute of Limitations or by lapse of time.
>
> That the Sun Company is liable to the Ocean Company for the amount of the judgment in the Maine court, and for counsel fees and expenses of the defense by the Ocean Company of that suit.
>
> Rec., p. 196.

The requests for findings, and the exceptions to findings and to refusals to find, appear in the record.

Requests, Rec., pp. 181–185.

Exceptions, Rec., pp. 197–201.

The opinion of the learned Chief Justice gives the grounds of the reversal of Judge Blachford's decree, and for the decree of the Circuit Court.

Rec., pp. 185–189.

Errors Assigned.

First.—The Circuit Court held that the Sun Company's policy covered the risk in which the loss was claimed, when it should have held that the Sun Company had never insured that risk.

Second—The court held that the policy of the Sun Company, construed as covering the risk as claimed, was not void by reason of any concealment in respect of such risk on the part of the Ocean Company, when it should have held that such policy was void by reason of a material concealment in effecting the insurance with the Sun Company by the Ocean Company, if the policy covered said risk.

Third.—The court held that the Ocean Company was not bound to make any proof of the loss, except by the record in the suit in Maine against the Ocean Company by the original assured, when it should have held that the Ocean Company was bound to prove the loss in this suit, as an original claim, under the policy of the Sun Company.

Opinion, p. 188, fols. 362–3.

Fourth.—The Court held that the question whether the Ocean Company had an insurable interest in the risk, which the Sun policy was construed to cover, was not contestible as matter of law by the Sun Company in this suit, but was concluded by the judgment of the Maine court that the original assured, as matter of law, had an insurable interest in the risk covered by the policy of the Ocean Insurance Company.

Opinion, p. 188, fols. 363–4.

Fifth.—The Court held that though the six years' limitation of the statute of New York governing this contract had been transcended, yet, the suit, *being admiralty*, the statute did not bar it, when it should have held that the

limitation of the statute barred the *remedy* on the contract, irrespective of the forum or form of the action.

Opinion, p. 189, fol. 364.

Sixth.—The court held that the *amount* of the recovery in the suit in Maine, was the measure of recovery in this suit, when it should have held that the amount at risk should have been found in this suit, as an original and substantial measure of the recovery.

The importance of this, aside from the abstract question of law, appears from the fact that the policy on the charter was not a *valued* policy, and the freight of the charter was not a *lump sum*, but only a rate per ton; and the possible tonnage under the charter was by stipulation, much less than the computed earnings for which the assured had a recovery.

Opinion, p. 189, fol. 306.
Findings, Nos. 32, 33, p. 196.
Ocean Policy, fol. 136, freight *not* valued.
Guano Charter, fol. 236.
Tonnage of Ship, 995 tons, new measurement, fol. 238.

"The quantity of guano to be shipped shall not exceed one-third above the vessel's register tonnage, new measurement, except with the consent in writing of the charterer's agent at Callao."

The insurance was $\frac{1}{8}$ %, £4 per ton for 1,750 tons (£7,000 at current exchange, $52,400); that is, $6,550 (Rec., p. 128, fol. 235). Whereas the charter stipulated only for not exceeding 1,327 tons, the freight on which would be but £5,308. Thus the $\frac{1}{8}$ insurance would be, say, $5,000, instead of $6,550, and the primage $2,650, would be proportionately reduced. The interest thus appearing would be less than $7,000, instead of $9,200, for which recovery was had in the Maine suit. This reduction, with interest thereon, would make the recovery about $12,000, instead of $15,485, for which the Circuit Court gave the decree.

Material Facts.

In and before March, 1864, the ship *C. Pennell* was lying in the port of New York, under charter for her full capacity to Sutton & Co. for a voyage to San Francisco. The Sun Company knew this, but had no knowledge of the particulars of the charter further.

Sutton Charter, p. 161.

Under an open policy with a customer, Conroy & O'Connor, the Sun Company had entered a risk on March 16, marine, premium 2½ per cent., and March 18, war, 3 per cent., on merchandise by "ship *C. S. Pennell,* New York to San Francisco."

Policy, p. 163; Risk entered, p. 166.

The Sun Company having in force an open policy with the Ocean Company for risks "from Cuba to Boston or Portland *on property,*" on the 10th February, 1864, at the request of the Ocean Company, opened the policy to other risks, by an endorsement in these words: "It is also agreed to issue such other risks as this company may approve and endorse hereon" p. 62.

This policy contained no clauses, nor was there any collateral agreement by which the Ocean Company acquired any rights in respect to the construction of risks, their acceptance, or in respect to losses or their payment, than what belongs to an *original* insurance under the policy. The insurable interest of the Ocean would, necessarily, rest upon its having insured an actual interest of some original assured, but the contract of the Sun was *simpliciter* of direct insurance, and not beyond or otherwise.

Policy, p. 60.

On the 25th February, 1864, the Ocean Company insured one C. S. Pennell, part owner, "$8,000, as against war risks only, on vessel, an d 8,000, marine risk only, on charter of

ship Charles S. Pennell at and from New York, to, at and from San Francisco and Callao to Chinchas."

The ship was *valued* in this policy at $40,000, and the charter valued at $8,000. The premium was $400, or 2½ per cent. for single risk on $16.000.

Policy, p. 152.

On the 23d March, 1864, George M. Melcher, captain and part owner of this ship, took out a policy from the Ocean Company, "$3,000, on ship Charles S. Pennell, at and from New York, to, at and from San Francisco and Chinchas, with usual liberties at Callao, to a port of advice and discharge in Europe."

In this policy the vessel is valued at $65,000, and the premium is $360—or 12 per cent.

Policy, p. 156.

On the same day, the Ocean Company insured Captain Melcher "$6,650, *on charter;* $2,650, *on primage:* and also $1,500 on property on board ship Charles S. Pennell, *at and from New York to San Francisco.*"

In this policy the property, charter and primage are open, *not valued.* The premium is $588.50 or 5½ *per cent.* for marine and war.

Prior to these insurances, Captain Melcher had executed a charter of the ship to agents of the Government of Peru.

This charter stipulates "that the vessel shall sail on or before the first of June, 1864 to San Francisco, and thence proceed, with all convenient dispatch to the port of Callao, Peru," to report. "That the said vessel, being then, on inspection by the appointed government officer, tight, staunch and strong, and well conditioned for the voyage," the agents "shall (within forty-eight hours after such report being received), send to the captain or his agents orders for loading a cargo of guano at the Chinchas Islands to which place the vessel shall at once proceed." "The said vessel shall, after completing her loading, as before mentioned, proceed to Hamburg or to Rotterdam, calling at Cones for orders."

The freight was to be "four pounds sterling, *in full*, per ton of 20 cwt., British net weight, of guano, subject, however, to a deduction for the water contained in damaged guano."

"The quantity of guano to be shipped shall not exceed one-third above the vessel's register tonnage, new measurement, except with the consent in writing of the charterer's agent at Callao."

Guano Charter, 128.

Immediately upon making the insurance of Captain Melcher on charter, primage and property on board, *by letter dated that day*, the Ocean Company reinsured in the Sun Company, $5,000 on ship, and $5,000 on charter, out of the $8,000 on each, for which they had insured Mr. C. S. Pennell, *a month before*.

On the 24th March the Sun Company replies that the rate for the $5,000 risks of Mr. C. S. Pennell would regularly be 4½ per cent. for marine, and as much for war, but they would enter these risks at four per cent. for each. Subsequently, the Sun agrees to take the risks at three per cent. each for both the war and marine risks, and they are so entered.

Thus, these risks of Mr. C. S. Pennell, taken at 2½ per cent. each, for war and marine risks, by the Ocean Company, were reinsured by it with the Sun Company, at an advance of 20 per cent. over the premium the Ocean Company had received on the risks.

The Ocean Company, also, on the same day on which it insured Captain Melcher, reinsured with the Sun Company *his whole risk* on charter, &c., at an enhanced premium of one per cent. beyond what it received from Melcher.

The policy in suit is that of the Sun Company upon the Ocean Company's interest as original insurer of Captain Melcher on charter, primage and property on board, by its policy of March 23, 1864.

The written application of Captain Melcher (by Sawyer, his agent), to the Ocean Company, was as follows:

"I wish for George M. Melcher $6,550 on charter, and $2,650 on primage, and $1,500 on property on board ship Charles S. Pennell, at and from New York to San Francisco, including war risk.

March 23, 1864.

ANDREW S. SAWYER."

This was entered on the Ocean Company's book in full

Rec., p. 147, fol. 270.

The application by the Ocean Company to the Sun Company, under the latter's open policy, was as follows:

"To the Sun Mutual Insurance Company:

Enter an open policy of this company, No. 51,564, $6,550 on charter, $2,650 on primage, and $1,500 on property on board ship Charles S. Pennell, at and from New York to San Francisco, including war risk.

Rate, six per cent. on board.

OCEAN INS. CO.,
Per G. A. W., Sec'y."

Upon this the vice-president of the Sun Company marked his initials, "J. W., V. P."

Rec., p. 70, fol. 129.

The actual entry on the open policy of the Sun Company was as follows:

"March 23. Ship Chas. S. Pennell, from New York to San Francisco, charter $6,550, primage $2,650, property $1,500, rate 6 per cent., war and marine."

Rec., p. 66, fol. 123.

The ship sailed from New York for San Francisco, filled up under the Sutton charter, and with no other cargo, April 1, 1864, and on the 25th May following, on the coast of Brazil, in fair, clear weather, with wind but six miles an hour, about four o'clock in the afternoon, the ship grounded on a soft shoal. She was soon got off, made ten days' sail to Rio, was condemned, sold for $5,000, which was all con-

sumed by expenses. The cargo was forwarded by the captain, by other vessels, to San Francisco, to earn the charter money on the Sutton charter.

At the time of loss, the captain was insured $8,000 on his one-eighth of ship, $3,300 on the Sutton charter, and (as he planned) $9,200 on the guano charter, and $1,500 on private property on board, making $22,000 on his interest of one-eighth in the ship and charters.

All this appeared by the master's own testimony at the trial of the suit in Maine.

Rec pp. 96–105.

Upon this state of the insurance by the Ocean Company an action was brought by Captain Melcher, in the Supreme Court of Maine, in which the plaintiff declared the insured interest as upon "a charter for the conveyance of a cargo of guano in the said ship Charles S. Pennell from the Chincha Islands to the ports of Hamburg or Rotterdam." Upon the policies and other documents of the insurance, the defense made by the Ocean Company, that its policy did not cover the alleged guano charter, was apparently successful, and Melcher, the plaintiff, offered parol evidence to show that to tne Ocean Company, in taking the insurance, the interest of the guano charter was declared by the assured and accepted by the Ocean Company as the subject insured. To the admission of this parol evidence the Ocean Company objected, as a variance of the written contract.

This question being the decisive point (as it appeared to the court), the trial was suspended, and the opinion of the Supreme Court *in banc* was taken as to the admissibility of the parole evidence offered. The court held it was a case of *latent ambiguity* as to which charter was the subject of the insurance.

The trial was resumed, the parole evidence offered was admitted, and upon that, and that alone, the court held the Ocean Company as an insurer of Capt. Melcher's interest in the guano charter.

Record, pp. 87–89, shows the case on the question of evidence, and the decision of the court thereon.

Record, pp. 105–108, for the parole evidence of Sawyer, who, as agent, effected the insurance.

Record, pp. 127–8, for letter of Melcher to Sawyer directing the insurance.

Record, pp. 159–161, shows the decision and opinion of the court *upon the case made by the parole evidence.*

The Parole Evidence.

TESTIMONY OF SAWYER.

Q. Examine the policy marked A in suit, and state whether or not that is the policy you obtained from the Ocean Insurance Company 23d of March, 1864?

A. It is.

Q. Did you have written instructions in relation to obtaining that policy?

A. I did; I received a letter from Capt. Melcher that day or the day before.

Q. Examine the paper shown you, marked E, and state whether that is the letter of instruction you received?

A. It is.

Q. State whether or not you exhibited that letter to the president of the company at the time you applied for insurance?

A. I did.

Q. At whose request did you exhibit it to him?

A. At his own; he asked me to hand him the letter.

Q. Did he take it and examine it?

A. He took it, and, I suppose, examined it; he made some comments on it.

Q. What time in the day did you receive the letter?

A. I think it came in the noon train; I got it about 2 o'clock in the afternoon, and I went to the Ocean Insurance Company the next morning at 10 o'clock.

Q. State all that was said and done between yourself and

the officers of this company at the time in relation to this policy of insurance and this subject-matter insured.

(Defendant objects to both form and substance; admitted subject to objection.)

A. After effecting an insurance on the ship, Mr. Woodbury asked me if I could give him any other insurance; I told him I had received a letter from Capt. Melcher requesting me to insure a guano charter; he said: "Let me see the letter;" I passed it over the desk to him; he took it in his hands, and says: "1,750 tons; ain't that a large amount to insure on that ship?" I told him I had insured the ship in his office when she had carried 1,800 tons in her; he said: "Homeward charter insure out; why didn't the captain ask you to insure all the way round, as he had the ship?" My answer was, before the ship got through, if the war closed, he could effect the insurance cheaper; I was to be advised by Capt. Melcher on his arrival at San Francisco, and agreed with him to insure in his office if he took it; he made some other comments; among others, he said: "What did Foye take the New York insurance for?" I told him six per cent. with the scrip earnings back; after some little talk, he told me he would take this at five and a half, and I was going to leave the office; he said: "It will be necessary to make application or sign one;" Wright copied an application on to his book, and I signed it without reading it; I don't know what I signed; it was mere form, I supposed.

Record, pp. 106–107.

* * * * * *

Q. What charter did you tell Woodbury you wanted insured at this time?

A. A guano charter.

Q. What descriptien did you give him of the charter?

A. I told him the captain was chartered for guano; he says: "I know it; Pennell has been in talking with me about it this afternoon."

Q. Did you state what voyage the guano charter was for?

A. I don't know that I did, for we had stated the voyage a few minutes before in effecting the insurance on the ship; I had effected an insurance on the same route a few minutes before; the same voyage for which this guano charter was for.

Q. Did you apply for any insurance to the Ocean Insurance Company upon any other charter or freight except the guano charter?

A. I did not at that time.

Q. Upon what voyage had you obtained insurance upon the ship at the Ocean Insurance Company's office at the same time?

A. New York to San Francisco, with liberties of Callao, to the Chinchas, and from thence to a port in Europe.

Q. Where did the conversation you have related take place?

A. In the Ocean Insurance Company's office, on Exchange street; three or four days after that I went for the policies.

Q. Who did you see there?

A. Mr. Wright, I think; no one else; he is secretary of the Ocean Insurance Company.

Q. What was said in relation to this charter?

A. I opened the policy, and read "$6,550 on charter;" I says to Wright, "You have left out the word guano;" said he: "That don't make any difference; the insurance you effected with Foye was freight; this is charter;" I said to him, "Hadn't you rather have charter than freight?" No, said he, "if I get freight and the vessel is wrecked, the freight helps forward itself, whereas charter is a total loss."

Q. Have you stated all the first conversation in relation to what Woodbury said to you about effecting this insurance?

A. He said a good deal in relation to not insuring the round voyage; I think I told him I should not insure her guano charter with a war risk; he wanted to know why; I told him the Southern Confederacy privateers did not burn guano ships; he referred me to one instance where it had been done.

Record, pp. 107–108.

E.

NEW YORK, March 20th, 1864.

ANDREW SAWYER, Esq.:

Sir: The ship C. S. Pennell is now nearly loaded, and will sail in all of this week. Fanny arrived here safe yesterday. Ben. is going 3d mate. Mr. Waterhouse still by the ship, and will probably go the voyage. I want you to insure on my part of the ship, as follows:

Say war risk out to San Francisco, ship	$5,000 00
Charter to San Francisco, $26,500, ⅛	3,300 00
Primage on same	1,325 00
Homeward charter, from Chinchas, insure out, say 1,750 tons at £4, £7,000 at current rate of exchange, $52,400, my ⅛	6,550 00
Primage on same	2,650 00
Chronometers, Dent., 1883, Negos, 1261	500 00
And on our effects, clothing, etc,	1,000 00
Making total	$19,425 00

How are you, Mr. Maffit? I think you had better put 5 or $6,000 more marine risk in case I should lose the ship; war risks are now from 2 to 3 per cent. Capt. Childs has insured his ¼ of ship *Guardian*, both marine and war risks out and home, on the same round that we are going, for 9½ per cent. net; that is probably lower than you can get mine done for. I think you will do better to insure in different offices than you will in one alone.

The policies came all right; have not collected the insurance yet; will let you know the amount when received. Should you go to Boston about insurance, Page, Richardson & Co. will post you up, and if you can't get it done in Portland as low as 2 per cent. I think you had better try the Boston offices. Before I left the Columbian offered to insure for 2 per cent. war risk, net, and I think that is as low as you will get it done. Of course, do it at the same rate, for I have no idea of escaping the privateers this time,

and I shall want to say, "How are you, Mr. Semmes? good boy; best three in five for the two ships."

You had better attend to this at once, for I might get in trouble before I get clear of New York. I should use three different offices for the amount to be insured; but you, being on the spot, of course, ought to be the best judge, and should you be able to get it done by Wednesday, please write or telegraph, care of J. O. B. & Co., for I shall probably be detained on account of crew until Saturday, and I shall want to know how to act outside. Good-night, old boy; may your shadow never be less.

Your brother, G. M. MELCHER.

Record, pp. 127–128.

The Sun Insurance Company, at the time of entering upon its open policy the risk of Captain Melcher for the Ocean Company, had no knowledge whatever or suspicion of the facts shown in this parole evidence, nor did such knowledge come to the Sun Company till the evidence appeared at the trial of the suit in Maine.

Thereupon the Sun Company gave notice to the Ocean Company that if that company were held *by virtue of the parole evidence, which the Ocean Company had not communicated to it, it was not responsible on its policy to the Ocean Company.*

Findings, Nos. 26–29.
Record, pp. 194–195.

As early as June 10, 1865, the Ocean Company, at the request of the Sun Company, sent it a memorandum of the risks of all kinds it had taken on the C. S. Pennell, and what it had retained and what it had reinsured. In this letter the Ocean Company says: "*The captain, I presume, is largely over-insured.*"

Record, p. 76.

OPINIONS OF EXPERTS *on the materiality of the matter shown by the "parole evidence," and the effect upon the question of insurance by the Sun Company by its communication, on the one hand, and its concealment, on the other.*

1. DANIEL DRAKE SMITH, President of Commercial Mutual Insurance Company (of New York) for twenty-three years.
   Record, pp. 40–44.

2. AUGUSTUS W. WHIPPLE, marine insurer and insurance broker, in New York, for forty-one years.
   Record, pp. 45–47.

3. ANDREW F. HIGGINS, Manager of "U. S. Lloyds," a marine insurance association of private underwrtiers, and marine average adjuster, for thirty years.
   Record, pp. 47–52.

4. ELWOOD WALTER, President of Mercantile Mutual Insurance Company (of New York) for twenty-four years.
   Record, pp. 52–54.

Besides these experts called by the Sun Company, the Ocean Company called

CHARLES DENNIS, Vice-President of the Atlantic Mutual Insurance Company, whose testimony corroborates that of the Sun Company's experts.
Record, pp. 54–60.

Upon this state of facts, respecting the original insurance of Captain Melcher by the Ocean Company, respecting the Sun Company's insurance of the Ocean Company, the judicial proceedings in the action of Melcher *vs.* the Ocean Insurance Company in the Supreme Court of Maine, and upon the decisions of the District Court and of the Circuit Court below, the following points are made on the part of the Sun Company:

POINTS.

First Point.—The contract of the Sun Company's policy with the Ocean Insurance Company is simply of the marine risk described in it of the property exposed to the marine and war perils contemplated.

To make out the Sun Company's liability for a loss happened to this property rests with the assured, the Ocean Company.

This burden involves the proof of the loss as a peril of the sea, in the same sense in which it rests upon the original assured, and *also* a proof of a contract by which the Sun Company has insured that risk to the Ocean Company.

There is no privity whatever on the part of the Sun Company to or with either party in the contract between the original assured and the Ocean Company.

Neither has the Sun Company insured the Ocean Company against a risk that, right or wrong, a foreign court or a wayward jury would not cast it, in an action under its policy.

Such an insurance would involve perils quite beyond those of the natural winds and waves, and would be beyond the corporate powers of a marine insurance company.

N. Y. Bowery Ins. Co. *vs.* N. Y. Ins. Co., 17 Wend., 359.

> "Under the general powers conferred to make contracts of insurance an insurance company is authorized to make reinsurance, which operates not on the *risk*, but upon the *property* covered by the original policy.
>
> (Nelson, *Ch. J.*, and Bronson and Cowen, *JJ.*).

Accordingly, the analogy of *indemnitors to save harmless*, relied on by the Ocean Company, and the cases cited to support that doctrine, have no application to the contract of re-insurance.

But, on the settled terms of the authorities, the character of the contract of re-insurance being distinguished from a

simple insurance, only by the fact that the assured's interest in the property insured is that of an insurer, is perfectly ascertained.

1. Arn. Ins. *288, 289. "The contract of re-insurance is totally distinct from, and unconnected with, the primitive insurance; the original assured has no kind of claim against the re-insurer."

"The re-insurer is entitled to make the same defense to an action brought against him on the second policy, as the original insurer might on the first policy."

3. Kent's, Com. *p. 289. "The contract of re-insurance is totally distinct from and unconnected with the primitive insurance, and the re-insured is obliged to prove the loading and value of the goods, and the existence and extent of the loss in the same manner as if he were the original insurer."

When any privity with the primitive insurance is desired by the re-assured and conceded by the re-insurer, it forms an express and independent stipulation.

Emerigon (Meredith's Ed.), pp. 276–280.

See, also, 1 Story, C. C. R., 458.
6 Robertson (N. Y. Sup. Ct.), 316.
3 Caine's Rep., 190.
3 Bissell, 519.
56 N. Y. Rep., 104.

In England re-insurance is prohibited by Act of Parliament for a vicious tendency to speculation and wagers on rates of premium.

If to this vice there be added the priority now claimed, by which an estoppel is created against the re-insurer by the litigations of the primitive contract, the system of re-insurance would need to be abandoned, as shifting both the issues and the forum of litigation from that which belongs to the mere contract of insurance.

For further discussion on this POINT, see "Argument" appended, pp. 14–18.

Second Point.—Upon the whole case made against the Sun Company, upon the proofs in this suit, that company never insured any interest in the so-called Rotterdam or Guano charter.

In the suit in Maine, *on the documents of the insurance*, it was clear that even the Ocean Company could not be held to an insurance of the interest in the Guano charter.

The Ocean Company being held upon the "PAROLE EVIDENCE," and upon that alone, it is manifest that, no such evidence having entered into the Sun Company's contract, that company cannot be held as insurer of the interest in the Guano charter.

See Opinion Judge Blatchford Rec. pp. 176–9, fols. 325–331.

See appended "Argument" for full discussion of this point, pp. 18–28.

Third Point.—But, if in any argument, the Sun Company's policy can be held to embrace the interest in the Guano charter, then such contract is avoided by the non-communication to the Sun Company of the matter of which the Ocean Company had full knowledge, that is to say the matter disclosed in the "PAROLE EVIDENCE," and otherwise.

The doctrines of insurance law on this head are thorough and unflinching, as beseems the contract of insurance which, in all its facts, is one of UBESSIMA FIDES.

"An underwriter obtaining a policy of re-insurance is bound to communicate such information as he possesses in reference to the character of the party insured; and if he omit to do so, whether from misapprehension of the probable effect of such communication when made or from design, and the information be material to the risk or to the

amount of premium to be charged, the policy of re-insurance will be void."

1 Arn. Ins., *p. 289.
N. Y. Bowery F. Ins. Co. *vs.* N. Y. F. Ins. Co,, 17 Wend., 359.

Court held that information not communicated by the first insurer to the re-insurer, whether *intentionally* withheld or not, if material, would render the reinsurance void.

Statement of the matter not communicated p. 361.

Opinion of the court (Nelson, *Ch. J.*, Bronson & Cowen, *JJ.*) pp. 365-7: "The rule on the subject is very broad. "Every fact and circumstance which can possibly influence the mind of any prudent and intelligent insurer in determining whether he will underwrite the policy at all, or at what premium he will underwrite it, is material' 1 Marshal's Ins., 467. He must even give doubtful news concerning the ship, in cases of marine insurance, however little credit he may give to it himself. 1 Marshall, 471, Phillips 93-95." p. 367.

"If the facts communicated by *Thorne* were material, it is enough that they were withheld by *Merchant* on applying for re-insurance. Whether the omission was the result of mistake or design, was not an important inquiry. The assured acts at his peril in withholding information" p. 367.

Moses *vs.* Del. Ins. Co., 1 Wash. C. C. R., 385.

"It was the duty of the assured to communicate to the underwriters, a letter received by him, containing particulars of a hurricane which had occurred at Charleston after the vessel sailed; although the fact of there having been some gales on the coast of Carolina, was known to the defendants. The knowledge of the plaintiff was particular, that of the defendants was general."

"The ground, in short, on which the policy is canceled, is, *that the underwriter has been, in fact, deceived, not that the assured intended to deceive him.*"

1 Arn. Ins., *537.

" It must be carefully borne in mind that the effect of a concealment in avoiding the policy is to be determined *not* with reference to its essential influence on the nature of the risk, but with reference to its *immediate influence on the judgment of the underwriter*" *Ib.*, p. 538.

See the whole chapter of Arnould on " Concealment," Vol. I., pp. * 536–76.

Duer on Insurance, Vol. II., Lecture XIII., pp. 380–499.

2 Duer, Ins. Lectures XIII, p. 380, *et seq.*

" § 2. Marine insurance is, emphatically, a contract to borrow an expressive phrase from the Roman law *uberrimæ fidei*, of the most abounding good faith. It abhors deceit, dissimulation, evasion. It condemns alike, the suppression of truth, and the assertion of falsehood. It seeks to place the parties, as far as practicable, on the ground of an entire equality, and, therefore, exacts from both a frank and unreserved candor, an open and lucid integrity. The general rules are, that each is bound to communicate to the other, all facts within his personal knowledge, that tend to show the true character and value of the risks that are meant to be covered, and that each, in his own communications to the other, is bound to state the exact and the whole truth, in relation to the facts that he represents, or upon inquiry, discloses (*a.*)

"§ 3. It is not necessary, in order to avoid the policy, that the misrepresentation or concealment of material facts, shall appear to have been intentional and fraudulent. Whether it resulted from design, or from ignorance, mistake or inadvertence, the effect is the same. The reason is evident. The misrepresentation or concealment, from whatever cause it proceeded, alters the basis upon which, in the understanding of the parties, the contract was founded, and therefore, vitiates that mutual consent which is essential to its validity. The contract, as is sought to be enforced, is not that to which the assent of the parties was meant to be given."

pp. 380–381.)

"§ 13. The assured will not be allowed to protect himself against the charge of an undue concealment, by evidence that he had disclosed to the underwriters, in *general* terms, the information that he possessed. Where his own information is specific, it must be communicated in the terms in which it was received. General terms may include the truth, but may fail to convey it with its proper force and in all its extent. Nor will the assured be permitted to urge, as an excuse for his omission to communicate material facts, that they were actually known to the underwriters, unless it appears that their knowledge was as particular and full as his own information. It is the duty of the assured to place the underwriter in the same situation as himself; to give to him the same means and opportunity of judging of the value of the risks; and when any circumstance is withheld, however slight and immaterial it may have seemed to himself, that, if disclosed, would probably have influenced the terms of the insurance, the concealment vitiates the policy."

pp. 398–9.

"§ 16. The information possessed by the assured may not be material in itself, separately considered, yet may be of such a character that it would probably lead to further inquiries on the part of the underwriter, and if the result of the inquiry would show the information to be material, it must be communicated. Its concealment, whether fraudulent or innocent, will vitiate the insurance. So the communication of a fact, otherwise unimportant, may be rendered material and necessary by its connection with other facts or intelligence already known, or presumed to be known, to the underwriter."

p. 403.

"§ 33. Where an underwriter seeks to protect himself by a re-insurance, he is bound to communicate, not only all the representations made to himself when he subscribed the policy, but all the knowledge and information he had subsequently acquired; and his concealment, whether from fraud or accident, of any circumstances then known to him, material to the risks, has the same effect on the validity of

the contract as that of a party originally assured (*b*). According to a decision of the Supreme Court of New York, his obligation to make a full disclosure is even more extensive than that of a party originally assured, for it embraces facts in respect to which the latter is permitted to be silent. The assured is certainly not bound to make any disclosure in relation to his own moral character. It would be absurd to suppose that he can be required to disclose, or confess, that he is unworthy of the confidence that he seeks. It is from other sources that the underwriter, when he wishes the information, must derive it. But the person who effects a re-insurance is bound to communicate all the information that he possesses relative to the moral character of the person whom he has insured, provided it has, plainly, a bearing on the risks that he desires to be covered. It was objected in the case in which decision was made, that if the party charged with the concealment had repeated, in terms, the information he had received, he might have subjected himself to an action of slander, had his information proved to be untrue. But, in reply to the objection, Bronson, *J.*, forcibly remarked, that he had yet to learn that a man who, without any intent to defame, repeats, in the legitimate course of business, and for an honest purpose, what he has heard of the character of another (*a*), is liable to an action, if the information proves to be erroneous."

pp. 429–30.

In the light of these indisputable doctrines of insurance law there can be no doubt—

(1.) That the Ocean Company was, at the time it applied to the Sun Company for this re-insurance, in possession of facts respecting the assured, Melcher, and his insurance, which were not known to the Sun Company or suspected by it.

(2.) That the Ocean Company communicated none of these facts to the Sun Company, that its judgment whether with this knowledge to insure at all, or at what premium to insure, might be exercised.

(3.) That these facts thus concealed were material on their face and in their very nature. They touched the integrity of the assured, Melcher. They exposed the speculative calculation of the insurance, the double interest, as of two voyages, both insured within the same termini and running at the same time.

They exhibited a gross over-insurance, and laid bare before the Ocean Company a plan to acquire, upon a loss of the voyage between New York and San Francisco, anticipated if not meditated, *a complete indemnity against that loss by insurance of the whole lump sum of the Sutton charter*, and, besides, *the gross amount of the guano charter, without earning, or starting to earn, a dollar of it, or having a ship at liberty to earn, or to start to earn, a dollar of that charter, between the beginning and the end of the traject of the voyage insured.*

(4.) That these facts were material to be disclosed, and how they were so, and were *vital* on the question of taking or measuring the risk proposed by the Ocean Company to the Sun Company, appears also in the testimony of the insurance experts.

(5.) That we do not need to *argue* upon the influence of these facts (in the form and pressure in which they were presented to the mind of a competent underwriter) *would have had* upon the Sun Company. We have a demonstration of the effect they *did have* on the Ocean Company.

It never took the risk at all, except on the concurrent purpose to throw it upon the Sun Company (though at an actual loss of premium in the transaction), and to exclude from the knowledge of the Sun Company the facts and proofs which had decided the Ocean Company not to *keep* the risk, lest they should decide the Sun Company not to *take* it.

More than this, upon the disclosures of Melcher's letter to Sawyer, his brother-in-law and agent, and the cross-examination of Sawyer as to the peculiar traits and reasons of this unprecedented insurance, the Ocean

Company immediately threw upon the Sun Company $10,000, out of the $16,000, of the risks taken from Mr. Pennell on the same ship, an imperfectly understood charter, more than a month before, and with which, from a general personal respect for Mr. Pennell. until the use, nature and possible outturn of the transaction were exposed by Melcher's insurance, the Ocean Company was well pleased.

This concealment on re-insuring *Mr. Pennell's* risk would have vitiated that policy, but the Sun had no intimation of the facts concealed till long after it had paid the Ocean Company on Mr. Pennell's risk.

The truth is, Melcher in writing his letter to Sawyer could never have imagined it would be shown to an underwriter.

It is impossible to conceive that the Sun Company could have taken the risk of Melcher with that letter before it.

It would be inexplicable that the Ocean Company *did* take Melcher's risk with that letter before it, except that it could, and determined to, enter it on its open policy with the Sun Company, which *would not have* that letter before it.

The consciousness of this *concealment*, when the re-insurance was effected, accounts for the strange suppression by the Ocean Company, in its relations to the Sun Company, in opposing the recovery of Melcher, of any allusion to this "*parole evidence*" till the exigency of the trial brought it out.

For further discussion of this point see
"*Argument*," appended, pp. 28–30

Fourth Point.—But assuming, for the argument, that the Sun Company's policy covers the risk in the guano charter, during the outward voyage to San Francisco under the latter charter, the Ocean Company had no insurable interest under that charter during that voyage in which the loss happened.

Unless Melcher had such an insurable interest, the Ocean Company, manifestly, had none.

It is impossible that a ship should have her whole capacity engaged in *two* charters, be pursuing *two* voyages, and be lost *twice* by one disaster, *for the purposes of insurance*, when in commerce, transportation, navigation, and common sense and common honesty such duplicity of service, of interest and of risk is a contradiction in terms.

The very cases which have held that a vessel, devoted to the charter, and sailing empty and disengaged from other service, is entitled to count her voyage as begun when she sails from her port of starting, put their decision upon that mere consideration, and exclude any such predicament of double charter, double voyages and double loss as lies at the bottom of this claim.

Barber *vs.* Fleming, 5 L. Rep., Q. B., 59.
1 Phill. Ins., § 335.
Hopkins' Mar. Ins., 295, &c.

The Supreme Court of Maine, in upholding the insurance of this charter interest, as between the Ocean Company and Melcher, puts its possibility as a contract upon its being entered into *with complete knowledge, and with express attention to the precise quality and extraordinary traits of the risk*, when it was insured.

This complete knowledge and express attention are imputed to the Ocean Company upon the "*parole evidence*," the letter of Melcher, and the discussion between Sawyer and the Ocean Company.

In other words, that court held that if parties entered

into such a contract with their eyes open, and weighing the consequences, it was not an imposition, nor necessarily a mere wager.

Erroneous as this judgment of the Supreme Court of Maine is conceived to be, it holds no doctrine that would sustain a judgment against the Sun Company upon its contract with the Ocean Company.

Opinion, Ch. J. Appleton, Record, pp. 160–161.

The Circuit Court, in giving its decree against the Sun Company, does not decide that there was an insurable interest to sustain the Sun policy.

The learned Chief Justice puts the decree, on this point, *solely* upon the ground that the Maine Court *adjudged* this proposition of law, *as between Melcher and the Ocean Company*, and *that* judgment concludes the Sun Company, as between it and the Ocean Company.

Opinion, Ch. J. Waite, Record, p. 188, fols. 363–364.

Thus we have Ch. Justice Appleton finding an insurable interest upon the special circumstances of the contract as between Melcher and the Ocean Company, which special circumstances are wanting in the contract between the Sun Company and the Ocean Company, and Chief Justice Waite, holding the Sun Company, on the *facts* of *its* case, concluded by a judgment in another case, which would not have been given upon the facts of this case.

For further discussion of the point of "insurable interest," see

"Argument," appended, pp. 30–33.

Fifth Point.—This supposed estoppel, on a question of law, does not rest upon the same considerations which, however erroneously, are thought to make the record in the trial between Melcher and the Ocean Company sufficient evidence of the facts of loss, &c.

This last named proposition rests on the ground that the *facts* common to the two litigations are reduced to a verdict, and that the verdict concludes, from a supposed privity, the Sun Company from further controversy on *them*.

> But, to make an estoppel as to fact or law upon an issue made, not upon what was *common* to the two insurance companies, but in respect of which they are *tolo eœlo* apart—to make an estoppel upon facts which could not be shown between Melcher and the Ocean Company, *because they did not exist*, and which the Sun Company could not intrude into that trial, because it was a stranger, and its facts *res inter alios*—to such an estoppel against the Sun Company on a question of law applicable to, and applied by the court to, a state of facts belonging to the Ocean Company's litigation, but absent from the Sun Company's litigation, is wholly to mistake the scope of estoppel upon a *judgment between others*, on the ground that the third party is concluded by the *subject-matter*.
>
> For a considerable discussion of this distinction, see Cromwell *vs.* Co. of Sac., 94 U. S. Rep., 351–358.

Sixth Point.—But if the Sun Company is held for the loss, the original insurance on freight and primage having been on an *open* and not a *valued* policy, the interest appearing on the stipulated charter money is much less than the amount for which a decree was given below, and if the decree is affirmed the amount should be reduced on a reference.

See this "Brief," p.

Seventh Point.—The question of the bar of the Statute of Limitations of New York is sufficiently considered in "Argument" appended pp. 33–34.

> It is a novelty that by the form of action, and a change of forum, the bar of the Statute of Limitations, which is *fitted to the contract*, can be defeated.
>
> It is the settled rule that in equity courts, when the subject-matter is of concurrent jurisdiction, the bar of the statute is as peremptory as it is at law.
>
> Story, Eq. Pl., § 751.

Last Point.—The decree of the Circuit Court should be reversed and of the District Court affirmed, with costs.

WM. M. EVARTS,
Of Counsel for Appellant.

Supreme Court of the United States.

THE SUN MUTUAL INSURANCE COMPANY,
Appellant,

vs.

THE OCEAN INSURANCE COMPANY,
Respondent.

ARGUMENT FOR APPELLANT.

Pleadings.

The libel alleges the making by the defendants of an open policy of insurance, issued to the libellants on the 20th day of March, 1864, to cover all such risks as the defendants should, from time to time, approve and endorse upon it. That prior to March 23, 1864, the ship *C. S. Pennell* had been chartered to the agents of the Peruvian Government, for a voyage from New York to San Francisco, thence to Callao and the Chincha Islands, for a cargo of guano, and thence to Hamburg or Rotterdam with such cargo. The charter was for $52,400, the primage on which was $2,650. That G. M. Melcher, being interested in the charter, in the primage, and certain property on board, the libellants being a marine insurance company themselves, had insured him at

and from New York to San Francisco against the perils of the seas $6,550 on that charter, $2,650 on that primage, and $1,500 on that property, against the perils of the seas, at and from New York to San Francisco. That on the 23d of March, the libellants having thus acquired an insurable interest in the charter, primage and property so insured, made application to the defendants to enter the same risk on the said open policy. That they accepted and endorsed it. That the vessel subsequently sailed, and was lost on the way to San Francisco, whereby that charter was totally lost, and Melcher's interest in it destroyed. That thereby the libellants, as insurers to Melcher, became liable to pay the amount of their policy to him. That on being notified of the loss by Melcher, they notified the defendants, and the defendants then declared that payment of such loss should be refused, and the same was refused. That subsequently Melcher sued the libellants upon their policy in the Supreme Court of Maine, and recovered judgment for the amount of the policy, with interest and costs; and this action is brought to recover the same amount, and also the expenses incurred by the libellants in defending the suit in Maine, from the defendants, under their policy (Record, pp. 1, 2).

The defendants, by their answer, admit the making of the open policy, but upon the express conditions, among others, that the respondent should take no risk under it, unless the libellant, being itself a marine insurance company, should take and keep an amount on the same risk equal to one-half of the amount so taken by the respondent. That the policy being originally confined to risks between the United States and Cuba, was afterwards, by a written memorandum, made applicable to all risks that should be subsequently endorsed upon it, but that none of its conditions were otherwise changed. That at the time of the insurance the defendant had no intimation of the existence of the charter mentioned in the libel. That the vessel was then lying in New York, bound on a voyage to San Francisco, under a charter from New York to San Francisco, and was then nearly loaded with a cargo to sail upon that voyage, which the defendants knew. That the libellants always claimed, until after judgment was recovered against them

in Maine by Melcher, that their own policy referred to the San Francisco charter, and to no other. That when the defendants accepted the risk, they understood it to apply to the charter of the vessel on her voyage from New York to San Francisco, upon which she was bound, and under which she was then loading, having never heard of the other charter mentioned in the libel. That the San Francisco charter was the only one insured by the defendants, and that, only upon the conditions contained in the policy.

The answer further denies the loss, and puts the libellants to proof thereof; and alleges that, after the loss, it transpired that Melcher's interest in the San Francisco charter was elsewhere insured to its full amount. That then he claimed that his policy with the Ocean Company applied to the Rotterdam charter, which the libellants denied, as the respondents always denied that their policy referred to that charter; and on that ground they acquiesced in the defense and litigation by the libellants of Melcher's claim against them. That Melcher sued and recovered judgment against the Ocean Insurance Company, upon the ground that by parol evidence he established conclusively an additional agreement wholly extraneous to the policy, by which, after full explanation of the existence of the two charters, his agent, who applied to the Ocean Insurance Company for the insurance, had a distinct agreement with that company that the insurance there applied for was intended to cover, and should and did cover, Melcher's interest in the Rotterdam charter, and had no reference to his interest in the San Francisco charter, by means of which parol evidence alone it was held, in that case, that the policy of the Ocean Insurance Company was applicable to the Rotterdam charter. That the principal feature of that evidence was a letter from Melcher to his agent, the applicant, expressly stating the facts, and what he desired. That, on the contrary, that letter was never exhibited to the respondents, and no information was ever communicated to them of the existence of the Rotterdam charter or of any purpose to insure it. They never heard of it until January, 1872, after the letter had been offered in evidence in the trial in Maine, when the respondent immediately notified the libellants that they would no longer co-operate in the defense of that suit, or be

bound by any judgment which should be recovered therein upon the fact of that parol evidence, inasmuch as none of the matters referred to in it were communicated to the respondents at the time of the application for insurance. That if the respondents, at the time of such application, had known of any intention on the part of the libellants to apply the insurance on charter to the Rotterdam charter, they would have declined the risk, for the reason, among others, that it would have involved a large over-insurance upon Melcher's interest in the ship, which would have been contrary to the rules and principles which govern prudent underwriters in making insurances, and would have offered strong inducements to Melcher to lose the vessel, and for other reasons. That by means of his double insurance of charter, Melcher, owning only one-eighth of the vessel, had accumulated an insurance upon all his interest to the amount of twenty-seven thousand ($27,000) dollars, which was about three times the value of his share in the ship.

The answer states, as separate points of defense, that the defendants did not insure the Rotterdam charter; that the libellants had no insurable interest in the San Francisco charter, which was what they did insure; that Melcher's interest in that was elsewhere covered; that the policy never attached by reason of the breach on the part of the libellants of the condition by which they were bound to carry half as much of the same risk as the defendants took, and this to whichever charter the policy applies; and finally, that the claim is barred by the Statute of Limitations (Record, pp. 4–10).

Statement of Facts.

At the opening of the trial, the defendant's counsel expressly insisted that the defendant was entitled to have full proof made of the facts constituting the alleged claim, the same as in the case of an original insurance; and that the fact of its being a re-insurance would not entitle the libellants to prove the loss, the interest and the value (the policy not being valued) by means of the judgment recovered in Maine. But the libellants tried and rested the case upon the theory

that no such proof was necessary. They first put in evidence the policy sued on (Exhibit No. 1, p. 60), which is in the ordinary form of an open policy of marine insurance, with none of the distinctive features or clauses of a re-insurance policy, and nothing to indicate that it was in the nature of a re-insurance, except the name of the Ocean Insurance Company, which being a marine insurance company, would naturally have only re-insurance risks and interest to cover, and the condition by which it was to take half as much of each risk as the defendants took. The only witnesses examined on the part of the libellants were Mr. Wright, the Secretary of the Company (pp. 10–18 and 25–27), and Mr. Rand, its counsel (pp. 18–25 and 27–35), neither of whom had any knowledge of the facts and information upon which the Ocean Insurance Company insured Melcher, or of the facts of the insurance by the defendant, except that Mr. Wright produced the correspondence by which it was effected, and testified that no oral communications passed upon the subject.

On the 30th of January, 1864, the policy was amended by writing thereon the words "also to cover such risks as the "company may approve and indorse thereon." This was in answer to a request from the libellants that the defendant would issue them an open policy of one hundred thousand ($100,000 dollars to embrace all risks except those covered by the Cuba policy (*See Exhibit Nos.* 2 and 3, p. 69). March 23d, 1864, Woodbury, President of the libellants, wrote to Whitehead, Vice-President of the defendants, a letter (*Exhibit No.* 4, p. 69), inclosing applications, as follows (*Exhibits 4a, 4b and 4c*, pp. 70–71):

1. (The application for the risk in suit.) "Enter on open "policy of this company, No. 51,564, $6,550 on charter; "$2,650 on primage; $1,500 on property on voyage ship "*Charles S. Pennell*, at and from New York to San Fran- "cisco, including war risk; rate, six per cent."

2. "Enter on same policy war risk only, $5,000, on ship "*Charles S. Pennell*, at and from New York to and from San "Francisco to Callao, San Francisco and Callao to Chin- "chas; rate, three per cent."

3. "Enter on same policy $5,000 on charter of ship

" *Charles S. Pennell*, at and from New York to, at and from " San Francisco and Callao to Chinchas; rate, three per " cent."

The application for the risk in suit (*4a*) is referred to in the letter only in the postscript, as follows:

" P. S. I also inclose an additional return for insurance " on charter, primage and property per ship *C. S. Pennell, to* " *San Francisco* only."

Whitehead replied by letter of March 24 (*Exhibit No.* 5, p. 71), accepting the risk on charter, &c., per *Charles S. Pennell*, $10,700, in conformity to the return, and proposes for the marine risk on the *Pennell* to San Francisco, and thence to Callao and the Chinchas, the regular tariff rate of four and a half per cent.; that their war risk on the same is worth the same, but they propose to enter for both marine and war on $5,000 for four per cent,

Woodbury replies, under date of March 26th (*Exhibit No.* 6, p. 72): "I think, really, considering that you have the " risk on charter, primage and property to San Francisco at " full rates, you should take the war and marine to San " Francisco and Chinchas on *C. S. Pennell* [meaning on ship] " at six per cent., as there is or will be but little risk in the " Pacific after leaving San Francisco. I can have both risks " done at less than these rates."

Whitehead replied, under date of March 28th (*Exhibit No.* 7, p. 72), that in conformity to his favor of March 26th he has entered the return of the 23d insurance per *C. S. Pennell.* And so the business was concluded, and the insurance, whatever it was, was made binding by the defendant; and the libellants being in possession of the policy according to the established course of business under it, indorsed upon it the risks taken in the language of the applications (*Exhibits 4a, 4b and 4c*, p. 66). The libellants then put in evidence their own policy to Melcher, in which the risk taken is described in the same language as expressed in the application (*4a*), viz., $6,550 on charter, $2,650 on primage, and also $1,500 on property on board ship *Charles S. Pennell*, at and from New York to San Francisco (pp. 73–76).

The libellants then put in evidence the judgment record

of the action, in Maine, of Melcher *against* The Ocean Insurance Company (*Exhibit No.* 11, pp. 77–81), by which it appears that Melcher declared upon an insurance of the Rotterdam charter, described and understood by him as a charter from the Chincha Islands to Rotterdam—not from New York to Rotterdam (Declaration, p. 77).

The defendant pleaded the general issue, which included *non assumpsit*. That action was commenced September 5th, 1866. It came on to trial at the April Term, 1870; the plaintiff proved the policy, the Rotterdam charter, the sailing of the vessel, her loss, condemnation and sale, and the value of his interest (pp. 92–105). He then called as a witness Andrew S. Sawyer (p. 105), who was a brother-in-law of Captain Melcher, and the agent for effecting the insurance. He produced a letter from Captatn Melcher to himself, dated New York, March 20th, 1864 (*see Exhibit E. p.* 128), fully explaining the two charters, and his desire to insure the Rotterdam charter, and directing the insurance; and testified that in applying for the insurance he exhibited that letter to the president of the libellants, who took it and carefully read it. He had previously, in the same interview, taken the risk on the ship, and, in so doing, had had fully explained to him the voyage on which the ship was bound under the Rotterdam charter. After effecting the insurance on the ship, he asked if Sawyer could not give him any more insurance; whereupon Sawyer produced the letter, and asked for an insurance on the guano charter. Woodbury read and criticised the letter, and particularly discussed the reasons for insuring the Rotterdam charter, only over the route from New York to San Francisco, and finally agreed to take the risk. Sawyer proves the distinct and explicit agreement between himself and Woodbury, that the insurance was to be on the Rotterdam charter, and nothing else. He had just insured the ship for Sawyer for the same voyage—New York to San Francisco, with liberties to Callao and the Chinchas, from thence to a port in Europe.

Sawyer further proved that when he called for the policy and opened it, observing that the guano charter had not been specified in it, he called the attention of the secretary to it, who said that would make no difference.

The Rotterdam charter (*Exhibit C, p.* 128) bears date Jan-

uary 30th, 1864. It does, in form, contain a stipulation that the vessel shall sail on or before the 1st of June, 1864, to San Francisco; but there is nothing dependent upon that in the terms of the charter. It is, in substance, only a charter from San Francisco. It stipulates that she shall thence proceed with all convenient despatch to Callao, and there immediately report to the charterers; she should then be inspected, and if found in good order and condition *for the voyage*, shall receive orders for loading a cargo of guano at the Chinchas, to which place she shall at once proceed, and shall convey from Callao to the islands any specie that may be required for the payment of the cargo, and tools, free of freight, and at the Chinchas shall take a full load of guano, and proceed to Hamburg or Rotterdam, returning first to Callao for final clearance. She has no duties to perform under the charter until her voyage to San Francisco is finished, and she starts from thence for Callao. She could really fulfill the charter without going to San Francisco at all, for if she went direct from New York to Callao, that would satisfy all that the charterers were entitled to under it. Doubtless, the sailing to San Francisco was put in for the benefit of the owners, both parties knowing that she was already engaged for that trip under the other charter previously made. The first penalty is for not being ready in Callao to proceed to the Chinchas Islands on or before the 15th of December, 1864, in which event the freight is to be reduced five shillings per ton.

This evidence having been offered by Melcher, the trial was suspended, and the question of the admissibility of this evidence sent to the full bench, being reserved for argument as a question of law (fol. 612). In this shape it was argued in October, 1870, and up to this stage of the case *the Ocean Insurance Company's defense was based upon the ground that the insurance they had made with Melcher was, not to cover the Rotterdam charter, but, as its terms import, the San Francisco charter only.* (*See Mr. Rand's points on that argument, Exhibit No.* 17 *a*, p. 86.) In January, 1872, the court decided to admit the evidence. (*See Rand's letter, Exhibit No.* 18, *and Judge Walton's Opinion, Exhibit No.* 18 *a*, p. 87.) The case was then brought to trial again before a jury, and upon this evidence a verdict was found for the plaintiff. But im-

mediately on being advised of Judge Walton's opinion, the Sun Insurance Company, which had previously acquiesced in the defense of the suit, notified the libellants, after advising with counsel, that if the effect of the admission of the evidence of the plaintiff in the suit against the Ocean Company was to be, to hold that company liable on a risk different from that described in and reinsured under the defendant's policy, they not being reinsurers of any such risk, would, of course, have no interest in the suit or its result. (See letter of Paulison, and opinion of Mr. Butler, p. 149).

The only other material evidence offered on the part of the libellant was of the correspondence and personal interviews between the counsel for the Ocean Insurance Company and the President of the defendants, Mr. Paulison. Mr. Whitehead, who took the risk, appears to have died shortly afterwards. Mr. Paulison became Vice-President of the Sun Company in January, 1867, and President when Mr. Grinnell retired in April, 1869. Whitehead died before 1867. The defendants assume that all this correspondence can have no bearing upon the question of the original insurance, or what it meant, inasmuch as Mr. Whitehead's intent could not be raised or evoked out of any conversations of Paulison in later years, he not having been at the time of the insurance in any way connected with the company. It can only bear upon the question of the liability of the defendants to reimburse libellants for the expenses incurred for the defense of the suit in Maine. The principle point in it is in relation to certain conversations between Mr. Rand and Mr. Paulison in November, 1869, about which there is no substantial conflict of evidence—it appearing that Mr. Rand came to New York to consult with Mr. Paulison. They then fully discussed the case upon all its points, except the nature and substance of the parol evidence, which the plaintiffs in the suit in Maine claimed the right to introduce. Rand presented himself as the counsel of the Ocean Insurance Company, who was then defending that suit. Paulison advised and urged a thorough and complete defense on all possible points. Whether Mr. Rand then knew of the existence of the letter from Sawyer to Melcher, and of its exhibition to the company, and the oral

agreement entered into thereupon, as subsequently sworn to by Sawyer, is not certain upon his evidence. But it is certain, upon his own positive testimony and Paulison's, that, whether he knew it or not, he did not, at any rate, communicate it, or hint of its existence, to Paulison. Both acted upon the theory that both companies had the same interest in the defense of the suit in Maine; and that the risk which had been taken by the Ocean Company from Melcher was the same risk which the Sun Company had taken from the Ocean. Acting upon this theory, Paulison promised to advance money that might be needed for fees and disbursements, and did actually pay one hundred dollars in that connection. There was more or less spirited correspondence after the result of the suit in Maine; but from the time that the defendants found that the libellants were to be beaten in that suit, if beaten at all, upon the ground that the risk that they insured was a different one from that which the Sun Company had taken, there was a complete breach between the parties, and a consistent attitude of resistance to the libellants' claim on the part of the respondents (*Evidence of Rand*, pp. 18–25 and 27–36; *Evidence of Paulison*, pp. 36–39 and 54 and 104; *Letters, Exhibits* 22–28, pp. 150–152).

The respondents, upon the trial, proved the other insurances made by the Ocean Company on the *Pennell*, viz., Exhibit No. 29, p. 152, by which they insured Mr. Pennell, another owner, $8,000 as against war risk, only against vessel. and $8,000 marine risk, only on charter, at and from New York to, at and from San Francisco, and Callao to Chinchas; and No. 30, p. 156, by which they insured Captain Melcher $3,000 on ship *Charles S. Pennell* at and from New York to, at and from San Francisco and Chinchas, with usual liberties of Callao, to her port of advice and discharge in Europe. This was the insurance on vessel mentioned in the parol evidence of Mr. Sawyer in the trial in Maine. It distinctly communicated to the Ocean Company the entire route of the voyage for which, as he told Woodbury, the vessel was chartered; and the fact of this insurance having been made by the Ocean Company was was not communicated to the Sun Company.

They next put in evidence the San Francisco charter (Ex-

hibit 32, p. 161), being a charter to Sutton & Co. of New York, putting the vessel into their Despatch Line of San Francisco, packets. It bears date December 24th, 1863, one month prior to the date of the Rotterdam charter, the vessel then lying ln the harbor of Portland, and charters the vessel for a voyage from New York to San Francisco for a full cargo of merchandise, the vessel to be consigned to the order of Sutton & Co., in San Franciso; and it being expressly understood and agreed that no cargo whatever should be received on board during the voyage, except with the consent in writing of the charterers. The charter money was to be $26,500 to be paid on discharge of the cargo at San Francisco; 45 running lay days for loading at New York were allowed from the time the ship is at her berth and ready for cargo, at which time and place this charter is to commence. In reference to which charter the respondents, in support of the allegations of the answer that they at the time of effecting the insurance knew of its existence, and that at the time of the insurance the vessel was loading with general cargo for San Francisco, proved that one week before the making of that insurance they had entered on the open policy of Conroy & O'Connor, other customers of theirs, two risks of merchandise from New York to San Francisco, against war and marine perils, one under date of March 16th and the other under date of March 18th (*vid. Policy, Ex.* No. 33, p. 163). That the vessel was advertised by Sutton & Company to sail in their line, in the *Journal of Commerce*, which was then taken to the Sun Company and was extensively advertised otherwise by them, from the time of her beginning to load in February. (*Evidence of Sutton*, pp. 44–45). The respondents then called four marine underwriters as experts, viz.; Daniel Drake Smith, President of The Commercial Mutual (p. 39); A. W. Whipple formerly Vice President of the Washington (p. 45); A. F. Higgins, for many years an adjuster of the firm of Johnson & Higgins, and now manager of the United States Lloyds (p. 47); Elwood Walter (p. 52); President of the Mercantile Mutual, representatives of the most reputable and experienced bodies of underwriters in this City; on the question of how far and in what manner it was material to the risk, in an application for insurance on charter at and from New York to San

Francisco, where the party had two charters, as in this case, that he should disclose the existence and the termini of both charters, and the fact that his intention was to cover by such an insurance, the risk of the Rotterdam charter over the route from New York to San Francisco.

They all concur in testifying that it is material to the risk that all these circumstances shold be disclosed; and they give sound reasons for that opinion, which are, in substance:

I. That it is material on the question of the rate of premium; because it would be worth more to take the risk of the Rotterdam charter over the route from New York to San Francsico, than to take the same amount of risk on the New York and San Francisco charter over the same route. Because, in case of a disaster happening, in the former insurance there would be no possibility of salvage; whereas, under the latter insurance there might be very large salvage, in some cases a salvage of almost the entire interest insured.

2. That it is material in determining the underwriter whether to take the risk at all or not, because underwriters are unwilling to take such a risk where the party has it in his power by two or more overlapping charters covering the same route or piece of route, to effect insurance upon two or three or any number of times the value of his real interest at stake between the two points described. That such insurances have never been known; and that the fact that the vessel was earning full freight under the San Francisco charter, would conclude them against taking a risk between the ports of New York and San Francisco on a subsequent charter, or a charter from and after leaving San Francisco dependent upon her reaching San Francisco.

They were, evidently, all of opinion that there was really no insurable interest in the insured in the Rotterdam charter, until the vessel reached San Francisco, she not sailing from New York for that port in ballast, or with only a trifling cargo on board, but with a full cargo, earning freight to her full capacity under a distinct charter between those two points. But to that as a legal opinion, the objection interposed by the libellants was sustained by the court.

The defendants also proved by the charterer Sutton, that he never gave any consent as contemplated by his charter, for the taking of other cargo than that put on board by himself, between New York and San Francisco, and that the vessel sailed fully laden with cargo under that charter (p. 45).

In answer to the evidence given by the respondents on the question of materiality to the risk, of the facts known to and not disclosed by Woodbury, the libellants, in rebuttal, called Charles Dennis, Vice-President of the Atlantic, who expressly concurs in the opinion that the information indicated was material to the risk (pp. 54–60). He thought that, to an honest man, there would be no temptation to destroy his vessel, because of the accumulated insurances on the charter over the route from New York to San Francisco. One reason he says for deeming the evidence withheld, material to the risk, is that he should want to know that two insurances were proposed for the same voyage, that he might weigh that fact as against the reputation of the applicant. He has never taken, or known of anybody else taking, such a risk as that claimed by the libellants, where the same party had a separate charter between the same points, viz., from New York to San Francisco, under which, at the same time, the vessel was earning full freight. He agrees, that under such an insurance of the guano charter, there could be no possibility of salvage, and thinks that there would not be any liability to general average, *because there was no interest at risk.* In a single instance, he remembers the case of an insurance by the Atlantic on charter from a port in the United States to a port in Europe, where the risk was agreed to be covered on the homeward trip preparatory to making that charter to be peformed by the vessel, although she was then carrying cargo; but he agrees that the terms of the policy in that case were very special, and that under an ordinary insurance of charter it could not have been covered.

Under this state of proofs the case was submitted for the consideration of the District Court. The District Judge dismissed the libel on the ground, as stated in his opinion, that, as matter of fact, upon the evidence the respondent, the Sun Company, did not insure the Rotterdam charter,

but the San Franciso charter. That by parol proof outside of the policy in the suit in Maine, especially the evidence of Sawyer and the letter exhibited by him to Woodbury, the President of the libellants, it had been established that they insured to Melcher the Rotterdam charter. That the parol information thus received by the libellants was material to the risk, and should have been communicated by them to the respondents, if they desired them to insure the Rotterdam charter, and that no such information was communicated, and that the respondents were not bound by the result of the trial in Maine.

POINTS.

First Point.—The respondents confidently insist that the libel was properly dismissed upon the ground that the libellants utterly failed to make the necessary proof of the main facts alleged in the libel, viz., the interest of Captain Melcher in the charter to Rotterdam, the loss of the vessel, the value of the interest (the policy not being a valued one), and that these facts are not proved by the judgment record offered in evidence. That they, the respondents, were entitled, in this action, to have those facts proved as against them, by evidence of the same nature and quality as an original insurer would have to prove them to establish such a claim.

(*a.*) It is not pretended that there was any agreement on the part of the defendant to be bound by the result of the trial in Maine as to these facts or any others. But the claim of the libellants to prove them by introduction of the judgment seems to rest upon a false idea of the relations of the parties to a reinsurance policy, and to assume that, if the policy is in its nature one of reassurance, the libellant has only to prove that he has taken a risk, and has become liable

to pay it, and that then the reinsurer must pay him. Whereas, the respondent insists that the libellant must prove that *he was himself liable to pay* the same risk which is the subject of the reinsurance; and the is the very point in dispute upon the pleadings here.

(*b.*) The authorities are uniform to the effect that a reinsurer is entitled to make the same defence, and to have the facts against him proved by just the same evidence as an original insurer would be obliged to make upon a common policy of insurance. No case can be found in which the party procuring reinsurance has rested upon the judgment against him as evidence of the substantial facts of his liability. In cases where that has not been in dispute, where it was conceded that the risk under the two policies was the same, the judgment against the first company has been admitted as evidence of the costs and expenses, to reimburse which the reinsuring company, by acquiescing in the defense of the suit, has agreed to become liable. The point in dispute upon the pleadings here is, whether the Sun Company insured the Rotterdam charter or the San Francisco charter; and it sheds no light upon that subject, to show that the Ocean Company has been adjudged upon evidence outside of its policy to have insured by it the Rotterdam charter.

(*c.*) The mere fact of the policy being one of reinsurance, does not put upon the reinsuring company the same risk which the first company took, unless it is so agreed by the policy or otherwise.

It may well be, and nothing demonstrates it more clearly than the result of the litigation in Maine, that an insurance or charter in the same identical terms may, in the one case, mean the charter to Rotterdam over the route from New York to San Francisco, and in the other, the charter from New York to San Francisco, the question one way or the other, depending wholly upon the mutual relations and disclosures and knowledge of the respective parties at the time of the making of the insurance. It cannot help at all

to solve the issue, in the one case, to show that the other company, upon a different state of facts, upon different information, and by a different agreement, entered into orally, and not incorporated in the policy, took a certain risk.

Chancellor Kent says, 3 *Kent's Com.* * *page* 279: "The contract of reinsurance is totally distinct from "and unconnected with the primitive insurance, and "the reinsured is obliged to prove the loading and "value of the goods, and the existence and extent of "the loss in the same manner as if he were the original "insured." To this he cites the authority of both Pothier and Emerigon, and also the very case cited by the libellants as authority for resting upon proof of the judgment alone. *N. Y. State Marine Ins. Co.* v. *Protection Ins. Co.*, 1 *Story's C. C. R.*, 458. On examination, it will be found that in that case the question of liability upon the reinsurance policy for the amount of the insurance was not disputed. The whole question was on the costs of the first suit; and the proof was of a request to defendant to defend, the risk being identical, and then the recovery of the judgment including the costs. This statement of the law, as contained in Kent, will be found fully sustained by all the authorities without exception, and the question has arisen in various forms, more recently and more frequently where the reinsurer has attempted to defend by showing that the reinsured has not himself paid the loss to the original party, or has by his bankruptcy become disabled from paying, or has obtained a discharge upon compromise for a smaller amount. But always the courts have held that the two contracts are perfectly distinct and unconnected, and that there being no privity between the original insured and the reinsurer, the reinsurer is fully entitled to make every defence and to exact every proof just as he might if it were not a reinsurance policy, but an original one.

See further The Yonkers Ins. Co. v. *The Hoffman Ins. Co.*, 6 *Robertson*, 316.

Emerigon, Meredith's ed., pp. 276 *to* 280.

Hastie v. *Depeyster*, 3 *Cai. R.*, 190.
Exparte Norwood, 3 *Bissell*, 519.
Blackstone vs. *The Allemannia Ins. Co.*, 56 *New York*, 104.

(*d.*) The misapprehension of the libellants on this point may well be accounted for by a failure on their part to observe the absence from the policy in suit of all those characteristic and peculiar clauses which from time immemorial have generally been inserted in re-insurance policies, but which, for reasons best known to themselves, the parties in this case have avoided, having adopted an ordinary form of insurance policy which does not contain them. The clauses of the description referred to are introduced for the express purpose of accomplishing substantially what the libellants have claimed the right to do here, viz., to demand payment without further proof than that they themselves have paid.

A complete review of the force and effect of such clauses is contained in *the chapter of Emerigon, section 9, of ch.* 11, *Meredith's ed., p.* 276, under this head: "*Agreement that in case of loss of the ship, the reassured* "*shall be bound only to show acquittance for the payment* "*by him made.*" One or two of such clauses may be cited. Thus, page 277: "Without the said assured "being bound to other proof in case of wreck or loss "than showing acquittance for the payment of said "risk by express agreement." Same page: "Without the said reassured being bound to proof of the "said risk other than the simple acquittance for the "payment which the said Gilly Brothers shall have "made thereon in case of loss." Page 278: "Promise "to pay the loss on the simple production of the "present policy and of the accounts to be sent from "Cadiz, to which full credit shall be given without "other documentary proofs."

In all these cases the plaintiffs successfully, and by the express agreement of the parties, rested upon such proof as the libellants have given here. And Emerigon says, p. 280: "It is seen from this jurisprudence how

" dangerous it is to subscribe reinsurances. One runs " the risk of becoming the victim of a too great fa- " cility on the part of the reassured, who, neglecting " all examination and discussion, pays sometimes losses " that he might have properly contested." But all this is by force of those express clauses; for, before treating of them, Emerigon (p. 276) reaffirms what he cites from Pothier, as follows:

" When it is an insurer who effects reinsurance, or a " lender on maritime loan who has caused to be in- " sured the goods on which he has made the loan, " and which are at his risk, they are bound to prove " the shipment and value of the merchandise just as " the owner, whom they represent, would have " been bound to do if the goods were at his risk, " and it had been he who had caused them to be in- " sured."

It is obvious, therefore, that, in the absence of the special clauses, which the policy in this suit does not contain, the respondents are entitled to have the same proofs made against them that they could require in the case of an original insurance; and that the fact that the libellants have been adjudged in a suit against them by the original party to pay their policy, is no proof that they were liable, much less that the defendants are liable upon the risk insured by the policy in suit.

Second Point.—The defendants with equal confidence insist that, upon the proofs in the case, they are not liable, *not having insured the libellants upon the Rotterdam charter*, and that upon the San Francisco charter, which they did insure, the libellants had, and upon the allegations of their libel claimed to have had, *no insurable interest.*

In the first place, we contend that insurance upon

charter means, as Judge Walton in his opinion defines it, and as the authorities generally define it, an insurance of the risk of losing *freight to be earned under charter;* and that where there are two or more charters, one coterminous with the voyage described in the policy, and the other covering that and also a route beyond, but which charter is meant is not pointed out in the policy nor between the parties orally, at the time of effecting the insurance, the legal and necessary intendment is, that the route described in the policy serves alike as a description of the voyage and the charter insured. Thus under the policy in suit, in the absence of all other proof, the insurance intended is presumed to be of freight to be earned under the charter from New York to San Francisco and no other. In other words, unless so agreed, the limits of the charter in such a case must be deemed to be not more extensive than the limits of the voyage described. Nor does the fact of the introduction of the words "at and" make the description inapplicable to the charter, because, as in the present instance, the Sutton charter shows, it involves the period of loading at the port of departure, the forty-five lay days during which the earning of the freight is as much at risk as after the sailing of the vessel. (But the words "at and from" might be inapplicable to the Rotterdam charter in this case, for that has no lay days at New York.)

That this is the necessary construction of the policy in the absence of extraneous proofs, is the clear result of the litigation in Maine. All parties agreed, counsel on both sides, and the court in that case, that if the parol evidence was inadmissible or should not be received, there was an end of the plaintiff's case, because the insurance must be deemed to be what the policy shows, an insurance on the charter at and from New York to San Francisco, and the plaintiff had declared on the insurance of a wholly different charter.

(*a.*) But conceding, as both sides assume, that the words, "on charter at and from New York to San

Francisco," may mean the one or the other of the two charters, if so expressly agreed, the question presented here is, whether the Sun Insurance Company did so agree. That the Ocean Insurance Company so agreed with Melcher that the words should apply to the Rotterdam charter, was proved and adjudged against it in the case in Maine. Did the Sun Company so agree? To answer this question upon the theory on which the case is presented by the libellants, and upon the authority of the Supreme Court in Maine, the court must look to the situation of the parties, must see what passed between them, what knowledge they respectively had, and what the applicant disclosed to the defendant; and on all this the evidence introduced on the part of the respondents bears with telling effect.

What Woodbury knew at the time of the application which he made to the Sun Company, is clear by the libel and by what was proved and adjudged against the Ocean Company in Maine. The libel expressly asserts that when the libellants made their application for reinsurance, they knew of and had in their minds the exact and complete description of the Rotterdam charter in all its details; and by the records introduced from Maine, it appears to have been fully proved against them in that case, that they did distinctly and unequivocally agree to take that risk.

In the next place, Woodbury having all this knowledge, and also complete knowledge of the San Francisco charter, too, applies to Whitehead for an insurance on charter at and from New York to San Francisco. What did Whitehead know, and how far did Woodbury impart to him the facts within his own knowledge; and what his intention was in making the application? This is the material question; for, of the duty of the applicant for reinsurance, to impart to the reinsuring company all the knowledge he has, just as in the case of an original insurance, and even to a more rigid extent, there is no doubt.

2 *Duer on Insurance, Lecture* 13, *part* 1, *section* 33.

"Where an underwriter seeks to protect himself "by a reinsurance, he is bound to communicate not "only all the representation made to himself when he "subscribed the policy, but all the knowledge and "information he had subsequently acquired; and his "concealment, whether from fraud or accident, of "any circumstances then known to him, material to "the risks, has the same effect on the validity of the "contract as that of a party originally insured." Citing particularly *Bowery Ins. Co.* vs. *N. Y. Fire Ins. Co.*, 17 *Wend.*, 359, where this duty was imposed by the court upon the appellant for reinsurance to a much higher degree than in the case of an original applicant; for they held an iusurance void, because the reinsured had failed to communicate information which he possessed relative to the moral character of the person whom he had insured, when that had plainly a bearing on the risks which he desired to have covered.

(*b.*) Now, as to Whitehead's knowledge; he knew nothing of the Rotterdam charter, that is clear. By the letters and applications he did know that the vessel was going beyond San Francisco, and that she was, or was expected to be under charter after leaving San Francisco, as far as Callao and the Chinchas; but that it was the same charter all the way around from New York, or that the charter beyond San Francisco began at New York, he had no knowledge, and there was nothing in the letter or the application to intimate any such thing. Charter means freight to be earned under charter, and there is no implication, much less necessary construction, to be put upon the words in *Exhibit No. 4c*, to the effect that a single charter had been made beginning at New York, and extending to the Chinchas, or that any charter had been made extending beyond the Chinchas to Rotterdam. There is not a word in it, or in either of the applications intimating the existence of any charter beyond the Chinchas, or to any proposed use of the vessel beyond that point. As the proofs show,

it is wholly unusal for charters to be made overlapping each other, two separate charters beginning at New York, one to San Francisco, and one to San Francisco and beyond. And what Whitehead must be deemed to have known was, not that there were two charters between New York and San Francisco, but that the ship was or was expected or intended to be under charter all the way.

Vid., also, Judge Blatchford's clear and conclusive disposition of the point attempted to be made by the libellants from the phraseology of the other application, and from its subsequent payment by the defendants, pp. 333–335.

(*c.*) At this point the facts in reference to the two charters are very material. The vessel had been already chartered in December, to Sutton, for the voyage from New York to San Francisco, when she was found and chartered again by the Peruvian Government in January. Finding her in the situation of being already engaged to San Francisco, to the extent of her full freight earning capacity, the agents of the Peruvian Government really charter her only from San Francisco. To be sure, there is a stipulation that she shall sail from New York to San Francisco, on or before the 1st of June; but there is no penalty attached to her not doing so, and there is no service to be performed by her under that charter until she sails from San Francisco. She is not even required to be fit for the voyage until she presents herself at Callao; and it must be deemed that the charterers under the second charter knew of the existence of the prior charter, and understood that they were to have no interest in the use of the vessel until she had discharged her cargo under the other charter at San Francisco.

It will be observed, that regarding it as a charter beginning at New York, it contained the extraordinary feature of a charter requiring a vessel to go to a

given point without any object, and thence return back on its previous track 3,000 miles to the port at which its labors, under the charter, were to begin. In considering the effect upon Whitehead's mind of the information imparted by the application (*No.* 4 *c.*), the question is whether Whitehead must be deemed from that to have known or to have inferred that, or to have been put upon inquiry to find out whether or not she was chartered from New York to the Chinchas, knowing, as he did, that she was in fact chartered from New York to San Francisco, to carry a full cargo and earn full freight. Did he also, or must he be deemed to have known from that application that she was under a double charter from New York to San Francisco, which is the material point? His knowledge of the San Francisco charter was, of course, general. He knew that she was up for San Francisco, in the Sutton's line; that she did not belong to Sutton; that she was carrying cargo and general merchandise between New York and San Francisco. He had no knowledge, of course, of the amount of the charter moneys, or of the amount of the primage; nor was there anything to show that $2,650 primage was more than could be earned by a vessel of 995 tons between New York and San Francisco. Could he, would he naturally have presumed that besides the charter from New York to San Francisco, she was under a double charter from New York to San Francisco, and thence to Rotterdam, and that the intention was to cover this larger risk for the shorter route?

It was to this point that the evidence as to the materiality to the risk of the information withheld by Woodbury was introduced on the part of the respondents. Woodbury and Whitehead were both old marine underwriters. The policy shows that the Ocean Company had long been in the field of underwriting in New York, and must be fully charged with a knowledge of what underwriters deemed material to be disclosed. Woodbury must, upon the evidence, he deemed to have known, and to

have had in mind what is testified to by Messrs. Smith, Walter, Whipple, Higgins and Dennis, that if you have two charters, such as there were in this case, and as Woodbury knew there were, and if you intend to cover, by your application expressed in general terms on charter at and from New York to San Francisco, the risk of the longer and larger charter over that route, you must disclose and are expected to disclose the existence and the termini of the two charters, and that it is your intention to cover the longer risk for the shorter route. No such thing was disclosed, and it is therefore incontestable that Whitehead, from the mere fact of no such disclosure being made on either point, must have presumed that there was but one charter covering the route from New York to San Francisco, and that that was the charter to Sutton, of which he had knowledge; that it was not the intention of Woodbury to cover any other charter but that, and that the words in *Exhibit* No. 4 *c*, "on char- "ter at and from New York to, at and from San "Francisco and Callao and Chinchas" meant what they would naturally be regarded to mean, that the ship was under charter, viz.: the San Franbisco charter from New York to San Francisco, and that beyond San Francisco she was also under charter, of course another and a later charter, but not that she was the subject of two or more over-lapping charters from New York to San Francisco.

(*d.*) It is precisely here that the evil pointed out by the experts, and which is the great subject of contention in this suit, comes clearly into view, viz.: the vicious purpose of the ship owner to procure, under the general name of charter at and from New York to San Francisco, many times the value of the real subject at risk, by means of over-lapping charters separately insured. If he can really do what Melcher sought to do in the case, and that, so far as the Sun Insurance Company was concerned, without any intimation of such being the intention, there is no limit

to the amount of insurance which the ship owner can procure under the head of charter over a route where, in fact and substance, he has only at stake the freight that his vessel can earn between those two points. Obviously, he may make

1. A charter from New York to San Francisco like the charter to Sutton.

2. A charter from New York to San Francisco and thence to Callao.

3. A charter from New York to San Francisco, and thence to Callao, and thence to the Chinchas, and

4. A charter at and from New York to San Francisco, thence to Callao and the Chinchas and to Europe, with a cargo of guano.

Now, if without notice to the underwriters he can make insurances on charter at and from New York to San Francisco to cover each and all of these four charters, although the vessel or his interest in her might only earn $5,000 between New York and San-Francisco, exerting her full carrying capacity, he may insure and recover five times, ten times, any unlimited number of times the real interest at risk. It is to protect themselves against such a possibility that underwriters very naturally expect and insist upon a a disclosure of the actual facts, and of the actual intent, so that they may decline, or if they are to accept, may accept with their eyes open, such extraordinary risks.

(*e.*) The Ocean Insurance Company, in this case, by no means stands in the position in which an ordinary applicant would stand, because, being a marine underwriter, it is expressly charged with knowledge of what is, and what is deemed by underwriters to be material to the risk; and when, knowing of the existence of both charters, and that they were intending under a description which would naturally be taken to mean an insurance of a charter only from New York to San Francisco, to get insurance upon the risk under a more extended charter between those two points, they in their application fail to disclose

the existence of the two charters, or their purpose to get such an advantage, they must necessarily be deemed to have left the Sun Company to conclude that the application meant what it seemed to mean, to cover only the charter from New York to San Francisco

Finally, on this point, we appeal to that well established rule of the construction of contracts, that the party seeking his remedy upon a contract must be deemed to have intended what he believed the other party would intend, or did understand by the language which he used, which is the rule of morals as well as of law. 2 *Parsons on Insurance*, * *p.* 10, *note, citing Paley's Moral and Political Philosophy, p.* 104: Where "the terms of the promise admit of more senses than "one, the promise is to be performed in that sense in "which the promisor apprehended at the time the "promisee received it. Where the terms of an "instrument are fairly susceptible of the meaning "in which the promisor believed they were under-"stood by the promisee, and in which they were ac-"tually understood, the rule of Paley is as good in "law as in ethics."

Citing also *Peters* vs. *The Ontario Ins. Co.*, 5 *Hill*, 147; also 1 *Duer on Insurance, p.* 159.

Obviously, then, Woodbury must be deemed, when he presented the application, to have intended that it should be understood by Whitehead in the way in which Whitehead did in fact understand it, and must upon the evidence be deemed to have understood it, viz.: that it was to cover the risk of freight to be earned under the only charter of which he had knowledge between New York and San Francisco, the Sutton charter, upon which it is conceded the Ocean Insurance Company had no insurable interest.

Or, if it still be claimed that Woodbury meant the Rotterdam charter, then, as it is absolutely certain that Whitehead meant the San Francisco charter and not the Rotterdam, clearly the minds of the parties

did not meet upon the same thing, and there was no contract.

"If one person consents to a thing, and another to "a thing in any degree different, so that their wills do "not completely coincide, this does not create a con- "tract between them. Each must consent to *exactly* "the same thing to which the other does, and at the "same instant of time." *Bishop on Contracts*, § 174, citing *Jordan* vs. *Norton*, 4 M. & W., 155, and *Hazard* vs. *New England Marine Insurance Co.*, 1 Sumner, 218. In the latter case the defendants, at Boston, insured for plaintiff, residing in New York, the ship *Dawn* at and from New York to the Pacific Ocean upon a whaling voyage, until her return to New York, or port of discharge in the United States, &c. The application for the insurance was by letter from plaintiff written in New York, in which letter the ship was represented as "a coppered ship." She was a coppered ship in the sense in which the term was used in New York, that is to say, she was coppered to a certain extent, but not sufficiently to come within the meaning of the term "coppered ship," as then used at Boston, the place where the underwriters carried on business. The vessel afterwards turned out to be very much worm eaten, and, on account of certain injuries sustained by reason of her worm-eaten condition, was abandoned as a total loss and suit was brought upon the policy. Defendants claimed that, by reason of the statement that she was "a coppered ship," there was misrepresentation in the application. Upon this point the court, STORY, J., says: "I do not say that "the owner or the agent practiced a fraud upon the "underwriters by procuring a policy under such cir- "cumstances—by misleading the underwriters. All "the parties may have been equally innocent. The "owner in New York may not have been aware that "the meaning of 'a coppered ship' in Boston is dif- "ferent from the meaning of such a ship in New "York. The agent in Boston may have been equally "as ignorant, as the underwriters, in regard to the "New York sense. What, then, under such circum-

" stances, would be the consequence? Plainly, that " it would be a contract founded in mutual mistake; " and, therefore, neither party would be bound by it. " They would not have contracted *ad idem*. There " would never have been an agreement to the same " subject matter in the same sense. This principle is " so well known and so familiar that it may now be " deemed to be treasured up among the elements of " jurisprudence." 1 *Parsons on Contracts*, 475; *Bruce* vs. *Pearson*, 3 Johns., 534; *Dana* vs. *Munro*, 38 Barb., 534; *White* vs. *Corlies*, 46 N. Y., 467; *Hughes* vs. *Mercantile Mut. Ins. Co.*, 55 N. Y., 268, and cases cited; *McCotter* vs. *The Mayor, &c.*, 37 N. Y., 325; *Fullerton* vs. *Dalton*, 58 Barb., 236, affirmed 49 N. Y., 659; *Utley* vs. *Donaldson*, 4 Otto, 47.

Third Point.—If the proposition put forth by the libellants' counsel, that, because it is a reinsurance, the defendant must be deemed to have intended the same risk which the libellants themselves had taken from Melcher, is accepted, then clearly the insurance was void, because of the concealment of the material facts already referred to, which they had received from Melcher, and which they failed to communicate to Mr. Whitehead in applying for the insurance.

(*a.*) It is true that the defendants have not distinctly, and as a separate defence, pleaded this concealment of material facts as making the policy void, because they insist, and have always insisted, that the risk which they took was that upon the other charter, and not the risk on the Rotterdam charter. But, if the court shall in any way come to the conclusion that the risk really insured by the defendants was the Rotterdam charter, whether they intended it or not, then we ask that, to avoid a failure of justice, the court will allow the answer to be amended so far as may be necessary

to set forth distinctly that the policy is void by reason of the material concealment. All the facts constituting this defence are contained in the libel and answer; that the plaintiff knew of the material circumstances, and did fail to communicate them, and that the defendants are not liable upon that risk. It is rather the legal conclusion than the statement of a further fact, that, by reason of the material concealment, the non-liability of the defendant results from the invalidity of the policy accruing therefrom. In either aspect, the evidence of the experts, who on both sides all agree, is conclusive, that the facts withheld were material.

(*b.*) The effect of the concealment is the same, whether fraudulent or innocent, whether intentional or accidental.

See Duer, Lecture 13, *part* 1, *sec.* 3.

"It is not necessary, in order to avoid the policy "that the misrepresentation or concealment of mate- "rial facts shall appear to have been intentional and "fraudulent, whether it resulted from design or igno- "rance, mistake or inadvertence, the effect is the "same. The reason is evident. The misrepresenta- "tion or concealment, from whatever cause it pro- "ceeds, alters the basis upon which, in the under- "standing of the parties, the contract was founded, "and, therefore, vitiates that mutual consent which is "essential to its validity. The contract, as it is "sought to be enforced, is not that to which the "assent of the parties was meant to be given. Had "the facts been known, as they really existed, it is "certain that the insurance would not have been "made, or not upon the terms on which it was, in "fact, concluded. If the fact suppressed or misrep- "resented, if truly disclosed would have shown the "risks to be greater than they were estimated by the "insurer, he world either have declined wholly to in- "sure them, or would have demanded a proportion- "ate increase of premium."

The many authorities cited by Duer fully sustain these propositions; and the evidence of the experts brings the exact situation of our case within the rule. That the opinions of the experts are founded on valid reasons, is also obvious, for the impossibility of any salvage, in the the event of the loss of the vessel between New York and San Francisco, if the insurance was upon the voyage around to Rotterdam over that part of the route, would necessarily enhance the premium to be charged; and the well founded reluctance of underwriters to permit the possibility of a double or treble insurance of freight under the terms of the charter by means of several charters artfully contrived to overlap and cover, several times deep, the same route, is not only well-established by the evidence, but rests upon the soundest principles of justice and prudence.

Vid., also *Delafield* vs. *Riley*, 7 Johns. R., 522.

Fourth Point.—If, as we cannot believe, the court should reach the conclusion that the defendants did insure the Rotterdam charter, and that that insurance was not void by reason of the concealment of facts material to the risk, we submit still that the policy could not attach under the circumstances, because of the utter want of an insurable interest in the freight to be earned under the Rotterdam charter before the arrival of the vessel at San Francisco, she being on the route from New York to that point, earning full freight under the San Francisco charter, and the Rotterdam charterers having no interest or concern whatever in the performance of the voyage to San Francisco.

(*a.*) We challenge the libellants to produce a single case from the books where such an insurance has been upheld, excepting only the decision of the Supreme

Court in Maine, in the case of Melcher against the Ocean Insurance Company. A careful examination of the authorities of the two cases from the English books relied on by Chief Justice Appleton as the authority for that decision will show that those cases were not in point, and that the court in them expressly reserved the question which is here involved.

Davidson, v. *Willasey* 1 *M. & S.*, 313, presented simply the question whether under an insurance of freight at and from Jamaica to the port of discharge in the United Kingdom (it being proved that the vessel was chartered from Liverpool to Jamaica, there to take on board a full cargo for Liverpool; and that at Jamaica, after her safe arrival, she had partly loaded, and was then lost by storm, the remainder of her cargo being on shore and ready to be shipped), the insured could recover the freight for the *whole* cargo intended to be shipped, or only for that which was actually on board, and does not present at all the question of whether there is an insurable interest in a second or third charter over the same route and beyond, when under a first charter the entire freight earning capacity of the vessel so far is absorbed and applied.

The case of *Barber* v. *Fleming*, 5 *L. R. Q. B.*, 59, which Chief Justice Appleton says resembles the case at bar in all its essential particulars, did not, as the court will see upon examination, resemble it in the precise point here involved. There, the insurance was from Bombay to Howland's Island, and thence to England, freight, chartered or otherwise. But the charter was not from Bombay, but from Howland's Island to England. The vessel sailed in ballast for the sole purpose of executing that charter, and on the way to Howland's Island she was lost. There could be no reasonable question of the whole freight under the charter being at risk, *because her sole purpose of sailing from Bombay was to enter upon the performance of that charter.* But the court put it

expressly upon that ground, *and that she was sailing in ballast for the purpose of earning the freight under that charter from Howland's Island.* By guarded language both Chief Justice Cockburn and Mr. Justice Blackburn reserved their opinion upon the question, whether if she had been earning full freight from Bombay to Howland's Island, there would have been any interest yet attached under the charter which was to begin from Howland's Island. It is not at all a case, and there is no case in the books of double insurance under overlapping charters over the same route, which is what is here attempted. The mere fact that no such insurance has been made except in this instance, as our proofs fully show, and that no case can be found in the books of attempt to recover such insurance, much less of such a recovery being adjudged, is a strong argument against its validity.

(*b.*) The universal rule is, that a mere expectation of freight, to be earned in the future, is not insurable. A ship may sail in ballast, or nearly in ballast, either upon the first passage of an extended charter, or to the port from which the charter is really to begin, for the purpose of executing that charter and the insurable interest of the owners in such chartered freight from the time she sails is obvious. But the case is wholly different where she does not sail in ballast, or for the purpose of entering upon the subsequent charter, but for the sole purpose of executing a previous charter under which she is earning full freight. The courts ought not to permit, as underwriters never have permitted, such double insurance. That it does hold out a powerful temptation to the insured to lose his vessel on the first voyage, and that with double or treble or quadruple force, according to the number of overlapping charters that he may contrive over that route, is obvious. And where, as in this case, the subsequent charter is made to begin in form only from the first port, and, because of the very fact that the vessel is already fully employed from there to

the second port, there is sufficient reason why the courts should construe it as beginning merely from and after the completion of the first charter, and should not give to the stipulation to sail from New York to San Francisco, on or before the first day of June the effect and meaning of beginning the charter at New York, which in substance and effect was intended to begin only at San Francisco.

See also on this point 1 *Phillips on Insurance*, 335, 5*th Edition.*

Hopkins on Marine Insurance, pp. 295, *et seq.*

(*c.*) After all, the authority of the Supreme Court in Maine in this particular case, weighty as it is, goes only to the point of holding underwriters upon such an insurance, when they enter into it with a full knowledge of all the circumstances, such as they found the Ocean Insurance Company to have, and clearly intending and knowing that an applicant intended to cover this extraordinary risk, and every step and proceeding in the case clearly indicates that the same court would not have held the underwriter upon such a policy liable upon such a risk unless he had so expressly agreed, after having all the facts fully disclosed to him.

Fifth Point.—The defense is also unquestionable under the Statute of Limitations. The loss occurred in 1864. The suit in Maine was commenced on September 5, 1866. The proofs of the loss had then long before been presented to the libellants, and immediately transmitted by them to the defendants, whereupon the right to sue became complete before the 5th of September, 1866. The present libel is dated September 24, 1873, and was filed on or about that day, more than six years after the cause of action, if any there were, accrued. So that on the question of liability of defendant upon the insurance for

the amount of the policy, the claim is clearly more than six years old when the action was commenced.

The suggestion that because the case is tried in a court of admiralty the libellants thereby escape the Statute of Limitations, is clearly not sustainable. The contract made in New York is subject to the Statute of Limitations of that State. And the Court of Admiralty, *in an action on a contract,* is just as much bound to enforce and measure the remedy according to the law of the State on the subject of limitations, as if the suit were in a State court. It may be that in a collision case, or other case in its nature exclusively of admiralty cognizance, the applicability of the Statute of Limitations may be somewhat in the discretion or control of the court, but not on contracts which are the precise subjects of the legislation of the State where the contract is made.

That the *lex loci contractus* applies will not be questioned, and no authority can be found in the statutes of the United States or the decisions of the Federal courts for rejecting the Statutes of Limitations applicable thereto.

Sixth Point.—The sole remaining matter for consideration is as to the liability of the defendants to reimburse to the libellants the costs incurred in the defense of the suit in Maine, which are proved by the judgment and the counsel fees expended by them in that behalf; as to which we submit, that, if the court shall determine that if the risk was not the same, but that the Ocean Insurance Company has subjected itself to a liability by reason of a parol agreement which was never made with or disclosed to the Sun Company, there is no liability to make good those costs or expenses. Under such a state of facts, such a liability could only have arisen from what passed between Mr. Rand and Mr. Paulison

in the course of that litigation. And as to that, the fact that whatever Mr. Paulison said, was said under the mistake of facts disclosed by the evidence, and on the assumption, on which both parties to the conversation spoke, that the risk was the same risk under the two policies, saves the defendant from all liability. Mr. Paulison's promise, such as it was, was to Mr. Rand for his counsel fees, and not to the Ocean Company; but without insisting upon that alone, it is clear that both parties discussed the matter of expenses upon the theory that whatever one company was liable for, the other was liable for; and that by the defense of the suit in Maine, the Sun Company would be protected. It turns out, however, that all of the expense incurred in the defense of that action was of no benefit and no protection to the Sun Company. It was a matter in which they had no possible interest, for it depended upon a parol contract, or a conversation of the Ocean Company, which formed no part of the contract of the Sun Company. And, even if the Sun Company at the outset of that litigation, had expressly stipulated to reimburse to the Ocean Insurance Company the expenses of it, the fact of the non-disclosure of the real nature of that controversy, and that it was one, in which they had no interest, would discharge them from any obligation in morals or in law to perform the agreement.

Last Point.—The libel was properly dismissed in the District Court, and the decree of the Circuit Court should be reversed, with costs.

JOSEPH H. CHOATE,
Of Counsel.

17-485

United States Supreme Court.

No. 119.

THE SUN MUTUAL INSURANCE COMPANY,

Appellants.

against

THE OCEAN INSURANCE COMPANY,

Libellant and Appellee.

BRIEF FOR APPELLEE.

BENEDICT, TAFT & BENEDICT,

Proctors for Appellee.

New York:

C. H. Jones & Co., Steam Book and Job Printers,

No. 114 Fulton Street.

1882

U. S. Supreme Court.

THE SUN MUTUAL INSURANCE COMPANY,
Appellant,

vs.

THE OCEAN INSURANCE COMPANY,
Libellant and Appellee.

No. 119.

Brief for Appellee.

This is a suit in Admiralty, brought in the District Court of the United States for the Southern District of New York, upon a marine policy of reinsurance, issued by the Sun Mutual Insurance Company of New York city to the Ocean Insurance Company of Portland, Maine, to recover the amount of a judgment recovered against the Ocean Company, and paid by it on an insurance issued by it, and which the libellant claimed to have been reinsured by the Sun Company.

The District Court dismissed the libel. The libellant appealed to the Circuit Court, which reversed the decree of the District Court, and gave a decree in favor of the libellants for $20,874.95, besides costs.

From that decree the Sun Insurance Company has appealed to this Court.

Pleadings.

The libel averred the contract of the Sun Insurance Company to reinsure such risks taken by the Ocean Insurance Company, as should be approved by the Sun Company, and indorsed on an open policy; the insurance effected by the Ocean Company and its approval and endorsement on the open policy; the loss; the suit in Maine against the Ocean Company on its policy, defended under instructions of the Sun Company, and the judgment against the Ocean Company, and its payment.

The answer set up several defenses.: (1) A denial that the Sun Company re-insured the particular risk, which the Ocean Insurance Company had insured and been adjudged to pay: (2) An averment that by the terms of the re-insurance agreement the Ocean Company was bound to retain one-half of the risk, and had failed to do so: (3) The statute of limitations of the State of New York.

Facts.

The facts of the case have been so fully set forth in the findings of the Court below (pp. 189 to 196) that they need not be repeated here.

The opinion of the District Court is at p. 169 (See 8 Ben. 272), and the opinion of the Circuit Court is at p. 185 (See 15 Blatch. 249.)

Questions to be Considered.

The questions to be considered arise under the exceptions of the appellant to the conclusions of law found by the Circuit Court (p. 196), which conclusions were as follows:

1. The Sun Company's policy covers the Rotterdam charter.

2. The policy is not void because of any concealment by the Ocean Company.

3. The judgment in the Maine Court against the Ocean Company is conclusive upon the issues there made and decided, and binds the Sun.

4. This action is not barred either by the Statute of Limitations or by lapse of time.

5. The Sun Company is bound in law to re-imburse the Ocean for moneys expended on account of counsel fees and the costs and expenses in defending the suit in the Maine Court.

6. The libellant is entitled to a decree against the defendant for

1. Amount paid in satisfaction of the Maine judgment	$14,320 84
2. Amount paid for counsel fees, expenses, &c.	1,164 70
In all	$15,485 54

with interest from July 21, 1873, and the costs in both Courts.

First Point.

The conclusion that "the Sun Company's policy covers the Rotterdam charter" was correct. It follows from the seven following facts:

1. The Sun Company's policy was a policy of re-insurance.

2. The Ocean Company issued its policy, which covered the Rotterdam charter.

3. The Ocean Company applied to the Sun Company to reinsure the risk which it had itself taken.

4. The Sun Company knew of the existence of the San Francisco charter.

5. The Sun Company also knew of the existence of the Rotterdam charter.

6. The description of the risk as to primage in the Sun's policy agreed with the Rotterdam charter, and did not agree with the San Francisco charter.

7. The correspondence and subsequent action of the parties show that they understood the re-insurance to cover the Rotterdam charter.

A. That the policy issued by the Sun Company, was a policy of reinsurance is found in the third finding (p. 190). It was averred in the third article of the libel (p. 1), and admitted in the third article of the answer (p. 4).

B. That the Ocean Company issued its policy which covered the Rotterdam charter is found in the ninth finding (p. 191).

C. That the Ocean Company applied to the Sun

Company to re-insure the risk which it had itself taken, is found in the eleventh finding. (Do.)

D. That the Sun Company knew of the existence of the San Francisco charter is found in the sixteenth finding, and is asserted in its answer (p. 5), where the respondent says "that at the time of "such application for reinsurance the said ship, "Charles S. Pennell, was lying in the port of New "York, bound on a voyage to San Francisco, "under a charter to carry a cargo of coal and other "merchandise from said New York to said San "Francisco, and that she was then nearly or entirely "loaded, and ready to sail upon that voyage * * * "as *was well known to the respondent.*"

E. The findings also establish that the Sun Company had knowledge of the Rotterdam charter. As it is expressed in the opinion of the Circuit Court: "*Knowledge of that to Rotterdam, or what is equi-* "*valent, of some charter to be in existence after the* "*ship left San Francisco, and before she returned* "*from the voyage on which she was about to sail,* "*is equally well established*" (Opinion, p. 186).

The grounds on which that knowledge is to be inferred are referred to in the 17th Finding, to wit, the correspondence between the parties as found, in connection with the facts throwing light upon it.

This knowledge appears from the findings as follows:

(*a*) At the same time that the vice-president of the respondent approved the return of reinsurance on charter, &c., in this suit, he approved another return of reinsurance on charter, to wit: "$5,000 on charter of ship 'Chas. S. Pennell,' at and from New York to, at and from San Francisco, *and Callao to Chinchas.*" (Eleventh, fourteenth and fifteenth findings.)

The respondents' vice-president could not, of course, have supposed this insurance on charter to

be on the short charter from New York to San Francisco, and that his company were to insure that charter on routes *beyond its terminus*.

So he knew, of course, that it was another charter. And we submit that as there was no other charter but the Rotterdam charter, the necessary presumption is that when he approved of that reinsurance on another charter, he knew it was the other charter that in fact existed, to wit, the Rotterdam charter.

But this is not all; the respondent subsequently paid this $5,000, thus reinsured (Twentieth Finding); and this payment was on the loss of the Rotterdam charter, the only other charter that in fact existed; and it paid without objection.

Thus we insist that the respondent must be held to have known of the Rotterdam charter, the only other charter that existed, as well as of the San Francisco charter, at the time of making the reinsurance in this suit.

The District Court, in the opinion at pages 178–9, says: "It is shown that the respondents paid to "the libellants, in discharge of the insurance which "they made in favor of the libellants of $5,000 marine "risk on 'charter' of the ship 'at and from New "York to, at and from San Francisco and Callao to "Chinchas,' the sum of $2,500, in October, 1865, and "the further sum of $2,500 in May, 1866. It is "strongly urged by the libellants that the fact of this "payment is evidence that the respondents knew "that in insuring 'charter' in the two insurances "made on 'charter,' March 23d, 1864, they were "insuring the guano charter.

"But the suit in Maine against the libellants, "brought by Melcher on their insurance of 'charter' "and primage 'at and from New York to San Fran-"cisco,' was not commenced until September, 1866, "and it does not appear that the respondents before "that time had any information that Melcher "claimed that such insurance covered the guano "charter, or that the respondents had *before that* "*time heard of the guano charter*.

"As there was not, in the insurance by the re-
"spondents of $5,000 on charter 'at and from New
" 'York to, at and from San Francisco and Callao to
" 'Chinchas,' any conscious insurance of a charter
"such as the guano charter was, in view of the
"other charter from New York to San Francisco, so
"there was not, in the payment of such $5,000 at
"the time and under the circumstances stated, any
"*conscious* recognition of an insurance on such a
"charter."

This view was not concurred in by the Circuit Court, and very justly, as we think, for that view comes to this:

The libellants say to the respondents, "The charter intended in the reinsurance in this suit was the Rotterdam charter."

"Nay," but say the respondents, "we supposed it was the San Francisco charter. At the time we made this reinsurance we had never heard of any other charter."

"Never heard of any other charter?" is the reply. "Why, what is this reinsurance which you approved at the same time—$5,000 on charter of ship 'Chas. S. Pennell' at and from New York, to, at and from San Francisco *and Callao to Chinchas?*"

"Oh yes, we see," say the respondents. "Here is a charter insured beyond San Francisco. Very true; that must have been some other charter, but at any rate we did not understand it was this Rotdam charter."

"Not understand that it was the Rotterdam charter? Didn't you pay under this reinsurance this same $5,000 on the loss of the Rotterdam charter?"

"Did we indeed," say the respondents. "Truly so it appears. But that was before Captain Melcher began his suit, and we did not know until that suit was begun in September, 1866, that he claimed to recover for the loss of the Rotterdam charter."

"Well," it is replied, "what has Captain Melcher's suit and claim to do with the $5,000 insur-

ance? The original insured in that was C. S. Pennel, another part owner."

"And, moreover, how can you say that you did not know that Captain Melcher claimed for the loss of the Rotterdam charter *until September*, 1866, when the usual proofs of loss were served upon you in August, 1864 (Finding 21, and pp. 12 and 13), and the answer expressly admits notice of this claim as early as April, 1865" (fol. 16, p. 7.)

"Ah, well," say the respondents, "the fact is that when we paid for the loss of the Rotterdam charter, we were not conscious of what charter it was that we insured, nor what charter it was for the loss of which we were paying. Doubtless we received the proofs of loss which Mr. Pennell furnished to you, as we did the proofs of loss which Capt. Melcher served on you; but we must insist, we never *consciously*, at any rate, heard of or insured or paid for the loss of the Rotterdam charter."

We submit that this view is quite untenable, and that there is absolutely nothing in this case to break the force of the fact that the respondents paid for the loss of the Rotterdam charter under a reinsurance, which was approved by the respondents at the very same time that they approved the reinsurance in this case.

Not one word of explanation is given to show that that payment was not made understandingly, or that the reinsurance under which it was made was not at the time of the approval thereof intended to cover that very loss.

b. The purposes of this argument do not depend, however, upon the respondents knowing exactly what the other charter was.

It is sufficient if they knew, as they unquestionably did, all that was essential for them to know in order to determine whether or not to accept a reinsurance of such other charter over the part of the route "at and from New York to San Francisco." They must be held to have had this knowledge, for

in passing upon the insurance "$5,000 on charter at and from New York, to, at and from San Francisco and Callao to Chinchas;" they knew that under *this* charter no cargo was to be carried over the route from New York to San Francisco, and that there could be no salvage if the loss occurred on this part of the route. They also knew that the vessel was to carry a full cargo under the short charter over this part of the route. So that in accepting the reinsurance of $5,000 on charter of ship "Chas. S. Pennell" at and from New York to, at and from San Francisco and Callao to Chinchas, the respondents decided to insure that charter, knowing that such reinsurance so far as the route "at and from New York to San Francisco" was concerned, had every objection that can be named to the reinsurance of the Rotterdam charter over the same route.

And that that decision was made under such circumstances of knowledge as to leave the respondents no ground of objection to the validity of that reinsurance upon this very passage from New York to San Francisco, is conclusively shown by the fact, that when the loss of the guano charter occurred on this passage, they paid the $5,000 loss without objection.

Not a particle of evidence has been offered to show that this payment was made under any misapprehension on the part of the respondents as to the subject of the loss.

c. In the opinion of the District Court (p. 178), it is also said of this application or return for the $5,000 risk, that it "conveyed no information that the charter for any route beyond San Francisco was a charter commencing at New York, or that, while it was a different charter from the one under which the vessel was carrying cargo to San Francisco, the two charters covered, both of them, the passage between New York and San Francisco, with cargo to be carried and freight to be earned under the one for that passage, and no cargo to be carried and no

latent ambiguity. Hence, in the absence of any evidence to show what charter was intended, the case would have failed, *not because the Court would have held the return to mean the San Francisco charter*, as the respondent's counsel and the District Court argued, *but from sheer uncertainty.* If the return *alone* could have resolved the alleged ambiguity, then there would have been in fact no ambiguity, and the case in Maine would have failed *because* the writing described the San Francisco charter and could not be varied by parol evidence.

As it is, there is nothing more or less to be said than simply this, that the return itself does not determine which charter was intended.

(*b*) The vice-president of the respondents then, on reading this return, must be held to have understood that it was not certain, from the face of the return, which charter was referred to, and that it might be either, and that the reinsurance was sought for whichever of the two charters the Ocean Company had in fact insured, and that thus the charter reinsured would be rendered certain by learning which it was that the Ocean Company had insured.

Id certum est quod certum reddi potest.

The principles of common honesty require this view to be taken, and are decisive, as we think, of this question.

Can it be possible to take exception to the following from the opinion of the Circuit Court (page 186):

"*As there were two charters, both known to the "Sun, that company ought to have understood that "the application related to the charter which had "already been insured by the Ocean.*

"*A policy issued under such circumstances will "be presumed to refer to that charter, unless a con- "trary intention is clearly manifested.*"

(*d*) But, furthermore, the item of $2,650 on primage agreed with the Rotterdam charter, but not with the other charter, under which the primage was only $1,325. The San Francisco charter was

for $26,500 (third finding), and primage is 5 per cent. on the freight.

This shows very clearly that Mr. Whitehead must have understood this charter to be the Rotterdam charter.

The fact that this insurance included primage, made Mr. Whitehead understand that this was an insurance of the Master's interest, and he, doubtless, understood that the Master had insured his interest in the Rotterdam charter as far as San Francisco, and that the other insurance on charter was for some other part owner.

(*e*) Again, in the letter of March 23d, 1864 (Eleventh Finding), inclosing the returns relating to the "Chas. S. Pennell," the president of the libellants, after referring in the body of the letter to the return of the "$5,000, on charter of ship 'Chas. S. Pennell,' at and from New York, to, at and from San Francisco, and Callao, to Chinchas," refers to the return in this case in a postscript as follows: "P. S. I also enclose an additional return for insurance on charter, primage and property, per ship 'C. S. Pennell' to San Francisco only."

Now it seems to us that any one reading this letter and postscript would understand the charter referred to in this postscript to be the same charter mentioned in the return referred to in the body of the letter.

And we submit that the natural impression, from the absence of any expressions in the letter indicating that different charters were referred to, would be that one and the same charter was referred to in both instances. And we refer with confidence to the opinion of the Circuit Court on this point (p. 187).

(*f*) Here were in this letter two applications or returns by the libellants for reinsurance on charter (Exhibits 4 A and 4 C., pp. 70, 71, and 11th Finding), evidently of separate and distinct interests, (as indeed was contended by respondents' counsel,) from the fact that there were two insurances over

(*a*) There is no description of the charter in the return.

The opinion of Walton, *J.*, upon this point in the suit in Maine is so terse and complete in its reasoning as to leave nothing to be added, and we content ourselves with quoting that opinion, which is as follows:

Walton, *J.*: "This is an action on a marine in-
"surance policy. The property insured is described
"in the policy as follows:

"Sixty-five hundred and fifty dollars on charter,
"twenty-six hundred and fifty dollars on primage,
"and also fifteen hundred dollars on property on
"board ship 'Charles S. Pennell,' at and from New
"York to San Francisco."

"It will be noticed that the defendants insured
"among other things a charter, meaning undoubted-
"ly the freight to be earned under a charter. At
"the time the vessel was lost she was sailing under
"two charters, one requiring her to carry coal and
"other merchandise from New York to San Francis-
"co, and the other to carry a cargo of guano from the
"Chincha Islands to Hamburg or Rotterdam. The
"vessel was lost on her outward voyage. The ques-
"tion is whether extrinsic evidence is admissible to
"show which of the two charters was the one insured
"by these defendants. The plaintiff offers to prove
"that it was the guano charter; and the defendants
"resist, upon the ground that the words 'at and
"from New York to San Francisco,' which occur in
"the policy, are descriptive of the charter insured,
"and that extrinsic evidence to show that any other
"was intended is not admissible, as its effect would
"be to vary and not explain the policy.

"We think the words 'at and from New York to
"San Francisco' do not describe any portion of the
"property insured, but simply the voyage during
"which the risk was to continue.

"It will be noticed that these words do not imme-
"diately follow the mention of the charter; that the
"primage and the amount insured upon it, and the

"other property on board the ship and the amount "insured upon it, intervene between the mention of "the charter and the words which the defendants "claim are a description of it. It seems to us highly "improbable that words descriptive of a thing should "be allowed to be thus separated from the mention "of the thing described. Besides, they are not, in "our judgment, such words as would be likely to be "selected to describe the charter, while they are pre-"cisely such as were necessary to describe the voy-"age. It seems to us that a charter, if described at "all, would be more likely to be described by the "character of the merchandise to be carried, while "the voyage, during which the insurance was to run, "would almost invariably be described by the men-"tion of the ports from which and to which the vessel "was to sail. Nor can we believe that the words in "question were used to describe both the voyage and "the charter. The property insured, and the voyage "during which the risk was to run, are very different "matters; and we cannot believe that any writer "would employ the same words to describe both. It "is difficult to conceive how he could have a descrip-"tion of each in his mind at the same moment— "how he could intentionally pen a single sentence "that should answer two such distinct purposes; "we cannot believe that the words in question were "written for two such distinct objects.

"We have then a policy in which a charter is in-"sured. Two charters are shown to exist, either of "which will answer the call in the policy. Which of "these charters did the defendants insure? Upon "this point the parties are at issue. How shall it be "determined? Why is not this the precise case of a "latent ambiguity, to remove which extrinsic evi-"dence may be resorted to? We think it is. Our "conclusion therefore is that the plaintiff's evidence "was admissible for that purpose. Store *v.* Ins. Co., "45 Maine, 175; 1 Green. Ev. §§ 287, 288, and "authorities there cited."

Note that this opinion holds it to be a case of

freight to be earned under the other for that part of the passage."

Upon this observe:

1st. But this application or return was for an insurance to commence at New York. It is "at and from New York to, at and from San Francisco," &c. So the insurance on this charter covered the passage from New York to San Francisco.

2d. It was for an insurance, on that passage, of a charter under which no cargo was to be carried and no freight to be earned for that part of the passage, as the respondents well knew, for they knew of the other charter—the San Francisco charter.

3d. And in making this insurance of such a charter over the passage from New York to San Francisco, the respondents did it knowing that in case of loss on this part of the passage there could be no salvage on this charter.

4th. And they also knew that the vessel was under another charter from New York to San Francisco, under which she was to carry cargo and earn freight.

5th. And on a loss happening on the passage from New York to San Francisco the respondents paid for the loss of the *Rotterdam charter* without objection.

Palpably this knowledge on the part of the respondents embraces all that it was material for them to know about the charter that actually existed, to wit, the Rotterdam charter, and all that was material to that risk.

The further route under this charter beyond the Chinchas could have been a matter of no importance to the respondents, as their insurance did not cover such further route, and in insuring "at and from New York to San Francisco," a charter under which no cargo was to be carried or freight earned on that

passage, there could be, in case of loss on that passage, no cargo to be forwarded so as to prevent total loss.

In Taylor *v.* Wilson, 15 East, 324, the insurance was on freight from St. Ubes to Portsmouth, the ship taking cargo at St. Ubes for Gottenburgh, intending to proceed to Portsmouth for convoy on her way to Gottenburgh.

The ship was lost on her way to Portsmouth. BAYLEY, *J.*, says:

"In case of the ship being lost before her arrival "at Portsmouth, the assured would lose all their "freight upon the entire voyage from St. Ubes to "Gottenburgh, and therefore they had an interest "in the whole subject of the insurance during that "previous part of the voyage. And it does not vary "the risk to say that the assured did not disclose "to the underwriters that the ship was to proceed "further on a voyage to Gottenburgh for I cannot "see what advantage it could have been to them to "be informed that the freight insured would not be "earned till the ship arrived at Gottenburgh, or "what disadvantage it was not to receive such in-"formation."

But can it be doubted that an underwriter, insuring on a charter as far as the Chincha Islands, would understand that such a charter was for the purpose of taking a cargo of guano to some port elsewhere?

F. The Sun Company therefore, had knowledge of the existence of both the San Francisco and the Rotterdam charter; and this knowledge on their part with the language of the return and the accompanying correspondence and the conduct of the parties in reference thereto, shows that the Sun Company, when it approved the return of reinsurance in this case, "$6,550 on charter, $2,650 on primage, and $1,500 on property on board ship Charles S. Pennell, at and from New York to San Francisco," agreed to reinsure the Rotterdam charter.

that part of the voyage from New York to San Francisco.

These two applications read together indicated that they were insurances on the same charter, but that in the one case the extent of the risk was "at and from New York to San Francisco," and in the other case "at and from New York to, at and from San Francisco and Callao to Chinchas," insurances we say on the same charter of separate interests, but differing in the extent of the risks, or passages covered.

There is nothing in either of these applications or returns describing or determining the extent of the charter.

The words "at and from New York to San Francisco," do not describe a charter, but they describe the duration and locality of the risk to be insured. So also the words "at and from New York, to, at and from San Francisco and Callao to Chinchas," do not describe a charter, but they describe the duration and locality of the risk; therefore, the term "charter" used in both returns stands precisely the same in both, and in the absence of any evidence to the contrary must be understood as referring to the same charter in both.

(*g*) Then again in a letter of March 24th, 1864, the Vice-President of the Sun acknowledges the receipt of the returns of March 23d, and writes that he has entered the returns in this suit on charter, etc., per Chas. S. Pennell, $10,700, in conformity thereto. (Twelfth Finding, p. 192.)

The rate on this return for war and marine risk is 6 per cent. This insurance is only to San Francisco.

So the Vice-President goes on to say that they want four per cent. on the marine risks in the other returns, the risks being to the Chinchas.

The President of the Ocean Company replies to this under date of March 26th, 1864 (thirteenth finding).

"I think really, considering you have the risk on *charter*, primage and property to San Francisco, at full rates, you should take the war and marine to San Francisco and Chinchas on C. S. Pennell at six per cent. as there is or will be little risk in the Pacific after leaving San Francisco. I can have both risks done at less than these rates."

Here we see no distinction of charter insured recognized, but only the additional distance covered by the insurance to the Chinchas. If the charters had been understood to be different, that fact could hardly have failed to be remarked upon, as that would have borne strongly upon the question of rates. And the Vice-President of the Sun Company would very naturally have said "*The insurance to San Francisco is of a charter under which cargo is to be carried over that passage, and there is a chance for salvage, but this charter which we are insuring from New York to the Chinchas is different in that respect and calls for a high rate.*" *But as it is, the Vice-President of the Sun Company simply acquiesces and consents to insure, notwithstanding the additional distance, at 3 per cent. for war risk and 3 per cent. for marine.* (See his reply, Exhibit No. 7, p. 72, and finding 14.)

This correspondence therefore treats both insurances on charter as being on the same charter. (See opinion of Circuit Judge, p. 187.)

(*c*) But now let us look at the conduct of the parties after the happening of the loss, as bearing upon this question. (See findings 19 to 34.)

The loss happened in the Summer of 1864, on the voyage to San Francisco. (Finding 19.)

Proofs of loss were duly served by Capt. Melcher upon the Ocean Company, and by that company turned over at once to the Sun Company. (Finding 21.)

It appears that the Washington Insurance Company in New York, were the insurers of Capt. Melcher's interest in the San Francisco charter.

There cannot be a particle of doubt that, at the

time the loss was first under discussion by the various underwriters, it was well understood what was insured by the various companies.

It was perfectly understood that Capt. Melcher was insured for both charters, to wit, that he was insured in the Washington for the San Francisco charter, and in the Ocean for the Rotterdam charter, and that the Sun Company were reinsurers of the Ocean Company on the Rotterdam charter.

And these underwriters discussed simply the honesty of the loss on the part of Capt. Melcher, and whether or not he was over-insured, and nothing else.

A man was sent out to Rio to find out what he could and make his report. (Finding 23.)

Can there be any doubt that the Sun Company had before them, at this early period, the fact that Melcher's claim against the Ocean Company, was for the loss of the Rotterdam charter, and not for the loss of the San Francisco charter which was insured in the Washington? The answer in fact admits it (page 7, fol. 15).

Now let us see how the question came to be started that the Rotterdam charter was not the charter insured.

In November, 1869, the witness, J. M. Rand, the lawyer who was defending the suit of Melcher against the Ocean Company in Maine, came to New York and had a conference with the then Vice-President of the Sun Company in relation to the defense of that suit. (Finding 23.)

Five years had elapsed, since the loss had occurred and the proofs of loss had been furnished and the first discussions had among the underwriters touching Melcher's insurances and the circumstances of the loss.

The loss of C. S. Pennell on the Rotterdam charter had been paid by the Ocean Company, and the Sun Company had paid the amount of its reinsurance on that loss, to wit, $2,500 in Oct., 1865, and $2,500 in May, 1866. (Finding 20.)

The suit by Melcher had been pending since Sept.

1866. The underwriters had gathered all the information they could in relation to Melcher's insurances and the circumstances of the loss of the vessel.

In this interview in Nov., 1869, between Mr. Rand and the Vice-President of the Sun Company, they went over the whole case, and discussed the points of defense that had been previously suggested by the companies. (Findings 21 and 23.)

Mr. Rand then stated to Mr. Paulison that in his opinion they could not be sustained by the evidence; but that he intended to take the point that the phraseology of the Ocean policy to Melcher containing the words "at and from New York to San Francisco" did not cover the Rotterdam charter.

This was clearly a legal point suggested by counsel, and was put, not upon what the parties really understood, but upon the manner in which they had expressed themselves in the policy.

This was a ground of defense that had never occurred to Mr. Paulison nor any of the parties. The idea of taking the ground that the Rotterdam charter was not covered by the policy was not in Mr. Paulison's mind at all, until it was put there by Mr. Rand.

Now, note that Mr. Rand then and there carefully explained to Mr. Paulison just what there was of that point, and that Melcher's counsel claimed that parol evidence would be admissible to show that the Rotterdam charter was intended, and that that would be a question for the Court, and that if the parol evidence should be admitted it "would be easy to anticipate what the verdict of the jury would be."

Mr. Paulison testifies that Mr. Rand did not tell him what the parol testimony was.

Neither, on the other hand, did Mr. Paulison ask what it was.

But Mr. Rand did tell him his opinion, that the effect of it would be decisive, and Mr. Paulison accepted that without further inquiry.

Indeed, they both evidently assumed that the

Rotterdam charter was the one really intended, and that it would undoubtedly be so proved if the phraseology of the policy did not prevent.

Now, what does Mr. Paulison do in the face of this statement on the part of Mr. Rand?

"After discussing the matter fully (says Mr. Rand), Mr. Paulison, turning to his books and laying down considerable law that I did not exactly agree to, we finally concluded—he told me he wished me to defend the suit at every point, to take every possible objection that could be made against recovery by the plaintiff, and avoid the payment of the loss, and he would pay me for so doing" (fol. 40), and on the following day Mr. Paulison paid him $100 on account, and took a receipt as follows:

"NEW YORK, Nov. 2d, 1869.

Received from the Sun Mutual Insurance Company, one hundred dollars, on account of legal expenses and services for defending the Ocean Insurance Company of Portland from claim for loss on charter and primage in case of the ship "C. S. Pennell," reinsured by the Sun Mutual Insurance Company for the Ocean Insurance Company.

(Signed) JOHN RAND."

See Finding 24, p. 194.

Now we submit with great confidence that the effect of this interview, acted upon as it was by the Ocean Company, was such that the Sun Company are concluded upon the question of their reinsurance applying to the Rotterdam charter by the decision of the suit in Maine in which the parol evidence spoken of by Mr. Rand was admitted, and the point established that it was the Rotterdam charter which the Ocean Company had insured.

And it is no answer for the respondents to say that at that interview Mr. Paulison did not learn what the parol evidence was which Mr. Rand indicated would be decisive of the case if admitted.

And we submit also that this interview shows that both companies had always understood that their

insurances involved in this suit were the same, and were on the Rotterdam charter.

The only reason for defending against Melcher, while Pennell was paid for his loss on that charter, was the suspicion that Melcher had been guilty of a dishonest loss, and it was upon this suspicion of a defense which the companies could not prove, that they justified themselves in endeavoring to defeat the claim of Melcher upon a technical ground which would not otherwise have been resorted to, and if justifiable at all was only justifiable on that ground.

Now, in November, 1869, Mr. Paulison hears Mr. Rand speak of parol evidence, which, if admissible in the suit in Maine, would show that the Rotterdam charter was the charter intended; and the respondents are not at all disturbed by that. It does not seem to be anything new to them or unexpected.

The companies are not driven apart by it, but, on the contrary, they unite in defense of the suit in Maine, with the clear assumption that the Sun Company will be bound to pay the Ocean Company if the parol evidence is admitted and the Ocean Company is defeated.

The suit goes on to trial, parol evidence is adduced and taken, subject to objection, and thereupon the case is withdrawn from the jury and the question of the admissibility of this evidence sent to the full Court for their opinion (Finding 25).

A printed case is made up, containing all the parol evidence (see Exhibit No. 15*a*, and fol. 609 and fol. 764 and 928), and a copy is inclosed to Mr. Paulison, President of Sun Company, in a letter dated October 6, 1870 (Finding 26). And in a letter of October 15, 1870, Mr. Paulison writes, "Yours of the 6th inst. was duly received, also the printed documents which you sent, *and which we have carefully perused.*" (Finding 26½.)

Now then, in these documents Mr. Paulison "*carefully perused*" *the parol evidence itself and the whole of it.*

What then? Does he withdraw from the defense of the suit in Maine? No, he does nothing of the sort, but he urges on the defense still. He argues against the admissibility of the testimony, but thinks that the main question is the question of interest. He says: "I do not mean to say that he had no interest in the charter party, but the risk under our policy being only to San Francisco ended before the charter party could by any possibility be performed. I think, therefore, that the main question is the question of interest, and think that the above reasons will be found sound in law. Please let me hear your opinion of them and also your line of defense—what your points are,—in order that I may be able to form some opinion as to the ultimate issue of the suit.

When Mr. Paulison wrote "the charter party," was he not referring to the Rotterdam charter, and to that alone? And why did he speak in that connection of "the risk under *our policy* being only to San Francisco," and of its ending before the charter could be performed, if at that time he understood that the risk under the Sun Company's policy was not a risk on the Rotterdam charter at all, but under another charter? The risk under their policy "being only to San Francisco" did not surely end before the *San Francisco* charter could be performed.

And again when he suggests that "the insurance of *the charter* to San Francisco was an insurance of only a *part of said charter*," is it not certain that he must have had in his mind, not the San Francisco charter, but the Rotterdam charter?

There is also a reference in this letter to the Washington Company's policy on the San Francisco charter, in these words:

"Besides, the ship was loaded to her full capacity and was carrying full freight on said passage, *outside of the charter*, which was covered under special policies. The plaintiff has, therefore, by the perils insured against in the policy, suffered no loss beyond what he has already been indemnified for under his policy on freight."

Thus with full knowledge in October, 1870, of the *exact parol evidence in the suit in Maine*, no surprise is expressed on the part of the respondents, and no claim or pretence that the respondents had not understood the situation before. Not one word, hint or suggestion in that direction.

The case then goes to the full bench and a decision is reached in January, 1872. And on January 16th, 1872, Rand writes to Mr. Paulison inclosing a copy of the opinion of the Court, and informing him that the Court had decided to "admit the proposed testimony" (finding 27), and calling for any papers of any kind relating to the defense.

On the receipt of this decision Mr. Paulison proceeds to consult counsel in New York and then it was that the respondents, under the guidance of their counsel, undertook to file out of line, and leave the Ocean Company in the lurch.

The way in which this effort was made will be found in Exhibits 21 and 21 *a*, pages 149, 150. And see findings 27 and 28.

It is noticeable, however, that here again it is *counsel* that suggests the point taken. And we submit that no candid mind can doubt, looking at the conduct of the parties themselves, uninfluenced by counsel, that they always understood the insurance in question to be upon the Rotterdam charter and not upon the San Francisco charter.

If the respondents, who knew of the San Francisco charter, had understood that that was the charter covered by the Ocean Company's insurance and their reinsurance, why is it that that misunderstanding did not present itself continually in most emphatic form, instead of finding no place whatever in the history of the case, the suggestion of counsel, even, never taking on any other form than that of making it a case of no insurance at all?

The fact is apparent that there never was any misunderstanding about it.

We cannot doubt that the review of the above facts taken by the Circuit Court will be deemed entirely just (See opinion, page 187-8).

(*d*) In the opinion of the District Court at page 179 it is said "From the time the suit in Maine was "brought by Melcher, setting up that the charter "insured by the libellants was the guano charter, "the respondents have always contended to the con- "trary, and have always contended, also, that the "guano charter was never insured by the respon- "dents."

This error is corrected by the 19th, 21st, 22d, and 23rd findings of fact made by the Circuit Court (see page 193) by which it appears that the vessel sailed from New York, April 1, 1864, and never got beyond Rio, where she was condemned and sold, and the voyage broken up and that in due time thereafter Melcher filed his proofs of loss of the Rotterdam charter with the Ocean Company, which were promptly forwarded by the Ocean Company to the Sun Company, who made no objections to the form of the proofs; but payment was refused by the Sun "*on the ground that the master was over-insured, and also on the ground that the ship had been fraudulently cast away, and the Ocean Company was advised not to pay the claim on that account.*" (Finding 21.)

And not one whisper was made that the proofs of loss embraced a charter not insured, to wit: the Rotterdam charter.

The Ocean Company followed the advice of the Sun Company and refused payment; and in October, 1866, Melcher commenced suit against the Ocean Company, who immediately gave notice thereof to the Sun Company, and the Sun Company interested itself in the preparation for defense.

But no other grounds of defense were suggested than those first raised by the Sun Company until November, 1869, when, there being a failure of evidence to support those grounds of defense, the point was suggested by counsel of claiming that the policy described the charter so that it could not (without reformation, of course,) be applied to the Rotterdam charter; and even this was accom-

panied with the concession that if the truth should be allowed to be proved it would appear that that charter was intended.

We suppose the idea here was to shut out the truth in this respect, because it was thought it could not be proved in another.

Thus it appears that it is quite a mistake to say that "from the time the suit in Maine was brought by Melcher, setting up that the charter insured by the libellants was the guano charter, the respondents have always contended to the contrary, and have always contended also that the guano charter was never insured by the respondents."

(*e*) It is a rule of construction that all contracts are to be read in the light of the surrounding cirstances.

It is also a rule of construction that when the subject matter of the contract is not so identified by the terms of the contract as to make it clear what was intended, extrinsic evidence may be given to show what subject-matter was referred to in the contract. In other words, the object of the evidence is to apply the contract to the subject matter intended; and in such case the Court will look at any and all extrinsic facts which tend to show what subject-matter the parties were contracting about. And such extrinsic facts will include whatever occurred between the parties either before, at the time of, or subsequently to the execution of the contract, which tend to show what subject-matter they intended to embrace in the contract at the time the contract was made.

"It is a familiar rule that parol proof of extrinsic circumstances may be given to apply a description to its subject matter."

"When the words of a grant are ambiguous, the Court will call in the aid of the acts done under it as a clue to the intention of the parties." (Giles *v.* Comstock, 4 N. Y., 273.)

In Miller *v.* Stevens, 100 Mass., 518, and 1 Am.

R., 139, the question was as to the meaning of the word "barrels," as used in a written contract—whether it meant barrels of statute measure, or barrels of 42 gallons, as used in the trade.

Two months after the contract was made the plaintiff tendered certain specific barrels of the latter kind, but the defendant refused them, for the reason only that the oil was not of the test required by the contract. Neither at this time, nor in the subsequent discussions that were had about the delivery, was any objection ever made by the defendant that the barrels were not what the contract required.

Touching this extrinsic evidence, the Court says: "The evidence that the barrels exhibited by the "plaintiff, and from which defendant's agent took "samples at the time of the plaintiff's offer to de- "liver, were of the capacity of forty-two gallons; "*that in all the discussions between the parties* "*concerning the delivery, no suggestion was made* "*that such barrels were not what the contract re-* "*quired; and that the defendants at that time in-* "*tended and were ready to receive those barrels if* "*the oil was of the requisite fire test, was compe-* "*tent to show that the parties at the time of making* "*the contract understood and intended to contract* "*for such barrels of oil as a specific article of* "*merchandise, and not to use the word 'barrel' as* "*the statute measure of quantity; and the question* "*of the intention of the parties in that respect was* "*rightly submitted to the jury.*"

In Chicago *v.* Sheldon, 9 Wallace, 54, the Court, NELSON, *J.*, delivering the opinion, say:

"In cases where the language used by the parties "to the contract is indefinite or ambiguous, and, "hence, of doubtful construction, the practical in- "terpretation by the parties themselves is entitled "to great, if not controlling, influence. The inter- "est of each generally leads him to a construction "most favorable to himself, and when the differ- "ence has become serious and beyond amicable ad- "justment, it can be settled only by the arbitrament

"of the law. But, in an executory contract, and "where its execution necessarily involves a practi- "cal construction, if the minds of both parties con- "cur, there can be no great danger in the adoption "of it by the Court as the true one."

(*f*) Under these principles we say it is plain from the extrinsic evidence that the insurance on charter "at and from New York to, at and from San Francisco and Callao to the Chinchas" was an insurance on the Rotterdam charter. There was no other charter to which that contract could apply; and that it did apply to that, and was intended to apply to that, is affirmed in the strongest manner by the subsequent conduct of the respondents in paying the loss on that charter.

This is evidence well recognized as proof of a very strong kind, based on the principle that admissions against interest must be held to express the real understanding of the party making the admission: "Men are supposed to act in their business transactions with reference to their interests" (56 N. Y., p. 11). And when the respondents paid $5,000 on the loss of the Rotterdam charter, under that contract, as they did at an early date, to wit, $2,500, October 23d, 1865, and the balance, $2,500, May 5th, 1866, this is proof conclusive that they understood that contract to apply to the Rotterdam charter.

We also submit, under these same principles, that the extrinsic evidence also shows that the reinsuranse, "$6,550 on charter, $2,650 on primage, and $1,500 on property on board said ship 'Charles S. Pennell,' at and from New York to San Francisco," had reference to the same charter.

(*g*) The respondents argue that they cannot be supposed to have intended to reinsure the Rotterdam charter, because that would be insuring on a charter over the passage from New York to San Francisco, during which no freight was to be earned under that charter, while the vessel was on that same voyage to be earning freight by a full cargo under another charter, to wit, the San Francisco charter, and that

to make such an insurance is what no prudent underwriter would do.

But we answer, the respondents concede that they made one contract of reinsurance covering in express terms the passage from New York to San Francisco on a charter under which the vessel was not to earn any freight between those points, and paid thereon for a loss happening on that passage, and that they made this contract with full knowledge of the fact that the vessel was to carry out from New York to San Francisco a full cargo of coal and other merchandise under another charter.

Now, if the respondents made one such insurance in express terms, embracing the passage from New York to San Francisco on the first-mentioned charter, and paid a loss happening on that passage, it is idle to say, that they cannot be supposed to have made the present insurance on such first-mentioned charter, because prudent underwriters do not make such insurances. The answer is, "You did confessedly in express terms make one such, then why not another?"

(*h*) The argument of the respondents failing in the foregoing particular, it is still urged that they ought not to be held to have intended to insure the actual charter that existed in this case, to wit, the charter to Rotterdam, because prudent underwriters do not insure a charter without knowing the termini of the charter, and the libellants did not communicate the termini of the Rotterdam charter at the very same time.

But the respondents did make one reinsurance, and subsequently paid the loss on this very same charter, when there had been the same failure on the part of the libellants to communicate its termini.

Their conduct in that case affords the best possible rule to apply to this. And it is further to be observed that it does not follow, because the libellants did not communicate the termini of the Rotterdam charter, that the respondents did not know of it, for

the vessel was here in New York, and the respondents had here the means of knowledge, and very probably these means were used. No evidence to the contrary was given, but rather evidence tending to show the probability of such knowledge being obtained. At all events, if such knowledge beyond what the respondents had were material, which we deny, the fact, that they paid the loss which they did pay, is sufficient proof that they did have such knowledge and all knowledge material at the time they made the reinsurance.

Besides, if they did not know the termini, they made the reinsurance, knowing that the termini had not been given, and if they deemed that knowledge material they were bound to ask for it, and not having done so they cannot now complain.

(*i*) The policy sued upon in this suit is a reinsurance policy.

This is admitted by the answer (third division) in the following language: "Third—That on or about the 16th day of January, 1864, the respondent issued to the libellant its open policy of insurance, being a reinsurance policy," etc.

The subject matter of the reinsurance has the same description in the reinsurance policy as that in the insurance policy.

These policies must therefore be applied to the same subject matter, unless there is something in the case to show that the reinsurance policy cannot be so applied without imposing upon the parties a different contract from the one they themselves made.

So far from this being the case, we think we have shown that there is no reason why it should not be so applied, but the strongest reasons why it should.

(*j*) Melcher's interest in the charter from New York to San Francisco, and his primage under it, were insured in the Washington Ins. Company (see testimony of Whipple and the answer herein.)

The libellants made no insurance on Melcher's interest in that charter, and have incurred no liability for loss on that charter.

Consequently, if it be held that the reinsurance by the respondents applied to that charter, then, of course, there was no reinsurance, and the contract between the respondents and libellants wholly fails of any effect.

It is a rule of construction that the Courts will favor a construction that will uphold and give effect to a contract rather than one that will render it of no effect.

It is a well settled rule in the interpretation of contracts that, when a clause is capable of two significations, it should be understood in that which will have some operation rather than in that in which it will have none.

> Poth. on Obl., pt. 1, c. 1, s. 1, art. 7.
> 2 Com. Cont., 532.
> Archibald *v.* Thomas, 3 Cow., 290.

If a contract admits of more than one construction, one of which will render it inefficacious or nullify it, that construction should be adopted which will carry it into effect.

> Williams, *C. J.*, in Brown *v.* Slater, 16 Conn., 192.

We come to the conclusion, then, that the reinsurance in this case was in fact upon the risk which the Ocean Insurance Company had taken in insuring Melcher's interest in the Rotterdam charter.

Second Point.

The second conclusion of law, that "the policy is not void because of any concealment by the Ocean Company," is entirely correct. There was no such concealment.

1. It should be sufficient on this point that no claim is made in the answer that there was any concealment, or that the policy was void for any such ground.

All the facts, as they now appear, were then perfectly known to the respondents. And yet it never occurred to them, nor even to the counsel who had suggested to them the defense which they did set up, that there had been any concealment by the Ocean Insurance Company.

2. But there was no concealment. The Sun Company knew every material fact. It knew of the existence of the Rotterdam charter, and that the Ocean Insurance Company had insured it. What was the evidence to prove that the Ocean Insurance Company had insured that charter, was surely not material for it to know.

But all this matter has been so fully gone over in the previous point, that it need not be repeated.

Third Point.

The conclusion being reached that the Sun Company did reinsure the risk on the Rotterdam charter, then the judgment in the Maine Court is conclusive, and binds the Sun Company in this cause to the extent of that adjudication, and establishes that the Ocean Company was liable to pay Melcher as it did in satisfaction of the judgment; and the Circuit Court properly so held.

The authorities on this point, so far as we know, all lead to this conclusion.

The case of Strong *vs.* Phœnix Ins. Co. (62 Mo. 289) is a direct authority to that effect.

> And see also N. Y. State Marine Ins. Co. *vs.* Protection Ins. Co., 1 Story 458.
> 1 Parsons on Marine Ins. 299.

(*a*) The cases reported of suits on re-insurance policies are few. There is no reported case of a suit on a reinsurance policy, except the case of Strong *vs.* Phœnix Ins. Co. above cited, in which a judgment had been rendered against the reinsured, where any question was raised by the reinsurer, except as to the recovery of costs.

We think it would hardly be claimed that the reinsured would have the right to recover of the reinsurer the *costs* included in the judgment which he had been compelled to pay, where he could not recover the *damages* included in such judgment.

If the judgment is conclusive as to the right to recover the costs, *a fortiori* should it be conclusive as to the right to recover the damages, which are the principal of which the costs are an incident.

(*b*) The principle, on which the reinsured are held entitled to recover the costs, includes the damages also.

It is said that they are entitled to the costs because they are "compellable" to defend the suit

against themselves. But how are they compellable to defend the suit, if their defending it leaves the parties in the same position as if they had not defended it?

They are bound to require the proper proof of loss in a suit against them, "so as to protect themselves by a *bona fide* judgment to the amount of the recovery against them under their reassurance."

But how do they protect themselves if the judgment against them leaves the parties in the same position as if there were no judgment?

If the reinsurers have notice of the suit and are silent, it is said they must pay the costs, "as they are exclusively, under such circumstances, incurred for the benefit of the reassurers, and are indispensable for the protection of the party reassured."

How can such costs be exclusively for the benefit of the reassurers if the reassurers are not liable to pay the judgment? How are they indispensable for the protection of the reassured, if he is in no better position after he has incurred them than before?

(*c*) The language of the books is doubtless that the reassured must prove his loss in the same way as if the suit were against him. This is strictly true where he pays on his policy without a judgment against him. And it seems that the language should be confined to such a case. Judge Story's logic is this: "The reassurers are entitled to make the same defenses as the original assurers, and therefore the original assurers must have a suit brought against them and pay on a judgment."

But if the position of the respondents in this case is the true one, logic requires the contrary conclusion.

If the reassurers are entitled to set up the same defenses after a judgment against the reinsured as before, clearly the reinsured are in no way required to have such a judgment entered against them.

(*d*) Again, we may ask, why should the reinsured give notice to the reinsurers of a suit against them,

except that the latter may have an opportunity to defend themselves. Does not the giving such notice to them make them the real parties in that suit, affected as really by the judgment as the nominal parties in the suit?

(*e*) The principle which lies at the foundation of the libellants' position as to the binding effect of the judgment is that which applies to all contracts of indemnity.

Where a claim is made against an indemnitee, he may pay at once and bring suit against his indemnitor, and the latter may set up the same defenses that the former would have had. The indemnitee would have to prove the facts which made him liable to pay.

But if he takes the other course and stands suit, giving his indemnitor notice of the suit, that he may defend himself, then the judgment in that suit is conclusive against the indemnitor.

Beers *v.* Pinney, 12 Wend., 309.
Trustees of Newburg *v.* Gallatin, 4 Cow., 340.

The same principle is applicable here: "Indemnity is the general principle which gave rise to fire and marine insurance." (Rawle *v.* American Mut. Life Ins. Co., 27 N. Y., 290.) "Policies of fire and marine insurance are properly contracts of indemnity. (*Id.*) Especially is this so as to reassurance." "After an insurance has been made, the insurer may have the entire sum he hath insured reassured to him by some other assurer. The object of this is indemnity against his own act."

3 Kent, 279.
1 Arnould on Ins., 286 (290).

"The celebrated L'Ordonnance de la Marine, of Louis XIV., enacted in 1681, in authorizing reinsurance, describes it as an indemnity."

Hone *v.* The Mutual Safety Ins. Co., 1 Sandf., 145.

(*f*) The special clauses in the French policies, referred to in Emerigon by the counsel for the respond-

ents, are the same that are mentioned by Mr. Justice Story in 1 Story R., 460, and they are clauses which authorize the original insurers to make *bona fide* a voluntary settlement and adjustment of the loss, which shall be binding upon the reassurers. They were put in, as he says, to avoid inconvenience and delay as well as peril; and they do not touch the question of the binding force of a judgment against the original insurers upon the reinsured.

(*g*) It would seem to be a most extraordinary doctrine to hold, if this Court should find that the respondents were reinsurers of the libellants on the Rotterdam charter, that yet, notwithstanding the libellants have been made liable in the suit in Maine for the loss on that charter, in the defense of which the respondents participated, this Court may go on and try the question of the libellants' liability over again in the present suit, and, perchance decide that the libellants were uot liable, and consequently have no claim upon the respondents for indemnity.

So far as the libellants' liability is concerned, the respondents have had their day in Court, and cannot now try that question over again in another tribunal.

(*h*) Such was our argument in the District Court as the decisions then stood. Since that time the case of Strong *v.* Phœnix Ins. Co., 62 Mo., has appeared, and is a direct decision upon the question in favor of the libellants.

Fourth Point.

The defense, set up in the answer of the respondent (fol. 14), that the ship never broke ground upon the voyage covered by the Rotterdam charter, in other words, that Captain Melcher had no insurable interest over the passage "at and from New York to San Francisco" in the Rotterdam charter cannot be sustained.

1. If that were the fact, then Pennell had no insurable interest over the same passage in the Rotterdam charter, and it may naturally be asked why did the respondents pay his loss on that passage of that charter?

2. But the conclusive answer to this claim of the respondents is the decision of the Court in the suit in Maine upon this very point.

The Court held in that suit that Melcher had an insurable interest over the passage "at and from New York to San Francisco" in the Rotterdam charter. See the opinion by Appleton, *J.*, page 297, reported in 60 Maine, 77.

That ground of defense was taken in the suit in Maine at the request of the respondents, and they are bound by the decision. See opinion of the Circuit Ct. (p. 188)

3. Besides, the authorities abundantly sustain the decision of the Court in Maine.

Melcher *v.* Ocean Ins. Co., 60 Maine, 77, and cases cited.
Barber *v.* Fleming, Law Rep., 5 Q. B., 59.
Thompson *v.* Taylor, 6 Durnford & East, 478.
Foley *v.* The United Fire and Marine Ins. Co. of Sydney, 5 L. R. C. P., 155.
Horncastle *v.* Suart, 7 East, 400.
Jackson *v.* The Union Marine Ins. Co., 8 L. R. C. P., 572.
Robinson *v.* Manufacturers' Co., 42 Mass., 143.
Adams *v.* The Warren Ins. Co., 39 Mass., 164.
1 Parsons' Marine Ins., p. 169, 182.
Taylor *v.* Wilson, 15 East, 324.

In Robinson *v.* Manufacturers' Co., 42 Mass., 143, the insurance was "on freight on board ship *Herald*, at and from Cadiz to one port in Sicily, and at and from thence to her port of destination in the United States."

The freight was valued at $5,000.

The plaintiff owned the vessel and had chartered her for a voyage from Palermo to New York, for $2,500, with $35 per diem demurrage.

The vessel sailed from New York bound to Cadiz, and thence to Palermo and thence home. She arrived at Cadiz and took on eight coils of rigging of fifty fathoms each, to be carried to New York, and being about to sail to Palermo she was wrecked in the bay of Cadiz.

In this case it was contended by the defense that the words "freight on board," meant freight of property when laden on board, which would have made a case of over-valuation. The Court say (pages 146 and 147), Shaw, *C. J.*, delivering the opinion:

"We are, then, to inquire, what is the effect of "the particular words used in this policy. The "words are '$5,000 on freight on board ship *Her-*"*ald*, at and from Cadiz to one port of destination "in the United States.' Freight valued at $5,000.

"There was an inception of the risk by taking in "some goods at Cadiz, though a small quantity, and "by commencing the voyage to Palermo in Sicily, "under a charter party previously entered into, for "a freight from Palermo to New York.

"In general the inception of a voyage, even in "ballast, from one port to another to take a cargo, "pursuant to a charter party, is an inception of the "voyage on which freight is to be earned, and if the "vessel is lost before arriving at the first port to "take in cargo it is a loss on freight.

"Then the question is, what was intended by "the words, 'on board.' The sentence is obvi-"ously elliptical. Considering 'freight' as the "hire or price to be paid for the use of the vessel,

"'freight on board' is unmeaning. Something "must be supplied. The defendants insist that we "must understand by it freight of property when "laden on board. But this is certainly not the "necessary or most probable meaning. It may as "well mean freight of property 'expected or in- "tended to be put on board' or 'agreed to be put "on board,' as in case of a charter party.

"By the defendants' construction, both rights to "freight could not co-exist, because no goods could "be laden on board at Palermo, till after the voy- "age from Cadiz to Palermo had terminated. But "we think it manifest from the valuation of the "whole freights, as well from Cadiz to Palermo "as from Palermo to New York, that it was re- "garded by the parties as one entire subject of in- "surance, and that it was intended to cover all the "freight of both voyages. And this is perfectly "consistent with the words of the policy, if we "supply the ellipsis, which must be supplied with "something, with the words 'to be laden on board,' "making it apply both to Cadiz and Palermo, which "is quite as consistent with the general purpose, "and more consistent with the whole effect of the "contract, than the words 'when laden on board,' "so as to prevent it from taking effect until the "goods should be actually laden or begun to be "laden on board.

"Such being the intent of the contract, the "freight expected on the voyage home might "amount to something over $2,500, and the freight "of the intermediate voyage appears to have been "considered very uncertain. We therefore do not "think the valuation was so great as to raise a sus- "picion of fraud."

"If the whole subject-matter intended to be in- "cluded in the valuation was not put at risk, then "the policy must of necessity be opened; and it "would not be consistent with the contract to per- "mit the assured to recover the whole valuation. "Forbes *v.* Aspinwall, 13 East, 325. Walcott *v.* "Eagle Ins. Co., 4 Pick., 249.

"In the present case, the whole subject intended "to be covered by the valuation, viz., the freight to "be earned between Cadiz and Palermo, and be- "tween Palermo and New York, were put at risk.

"Had the eight coils of cordage been carried safe- "ly from Cadiz to Palermo, and no loss occurred on "the freight home, the whole premium would have "been due to the underwriters, and they would "have been exempted from all loss. This was what "they insured. It was lost; and we think they are "liable according to the value agreed on by the "policy. We think the assurred cannot be in a "worse condition than if their vessel had sailed in "ballast from Cadiz to Palermo, to take on board a "cargo in pursuance of a contract, previously entered "into, to take a cargo from thence to New York, "which would entitle the plaintiff to recover in case "of loss."

Thompson *v.* Taylor, 6 Durnf'd & East, 478. Action on policy of assurance on half freight of ship valued at £ at and from London to Teneriffe, at and from thence to any of the West India Islands (Jamaica excepted), and at and from thence to Bay of Honduras; before the making of the policy plaintiff by charter party charters ship to Messrs. Cox upon the voyage, covenanting to depart out of river Thames on or before Feb. 9th, and proceed directly to Teneriffe, there receive on board from Messrs. Cox 500 pipes of wine, and thence sail to Barbadoes, and the Messrs. Cox covenanting to pay plaintiff for freight and hire of ship for the said voyage at rate of 35s. per pipe, freight to be paid within 20 days after certificate of delivery of wine.

Ship sailed from London on said voyage described in charter party, and on her way to Teneriffe she was taken as a prize. Lord Kenyon, *C. J.*: "The "property, against the loss of which the assured "wish to be indemnified, is that which he had a "right to receive under the charter party; and it "seems now admitted that if the contract had its "inception, if anything were done under it by the

"plaintiff who let his ship to hire, his right to freight "commenced; that depends on the words of the "charter party, which are 'that the ship should, "on or before the 9th of February depart out of "the river Thames and directly proceed to Port "Oratava in Teneriffe, and after the ship should be "ready to receive goods, lie 20 days and load and "receive on board her from Messrs. Cox 500 pipes "of wine, and then sail and proceed to Barbadoes.' "Now, it seems to me * * * there was an incep- "tion of this contract by the owner of the ship; "for the ship did sail from the Thames toward "Teneriffe, and was captured in the course of that "voyage. * * * As the plaintiff had begun to "perform his part of the contract, as he had done "something under it, which, if matured, would "have entitled him to his freight, I think he may "recover on this policy, which was an insurance on "freight."

Adams *v.* The Warren Ins. Co., 39 Mass., 163. Action on policy of insurance, dated 18th June, 1835, whereby defendants caused plaintiff to be insured the sum of $1,000 on the freight of the brig "Andes," at and from New York to St. Johns, East Florida, and thence to Charlestown, Mass.

Vessel was under charter to proceed without delay from New York to St. Johns, and there take on board a cargo of live oak timber, to be transported to the navy yard at Charlestown.

The existence of this charter party was not disclosed or known to the defendants until after the vessel was lost, but they made no inquiry on the subject when the policy was effected. The vessel sailed from New York, and was never after heard from.

The defendants contended that they were not liable at all for the alleged loss of freight under this policy.

Held, that they were liable.

Shaw, *C. J.* (page 164): "The assured had an in- "choate right of freight, which was an insurable in-

"terest. It was lost by a peril insured against, and "therefore the plaintiff has a right to recover."

Foley *v.* The United Fire and Marine Ins. Co., of Sydney, 5 L. R. C. P., page 155.

A vessel when about to proceed on a voyage, with cargo, from Calcutta to Mauritius, was chartered to proceed with all convenient speed on her present voyage to Mauritius, and, having discharged her cargo there, to sail and proceed to Akyab, etc., and load from the charterers a cargo of rice for a port in the United Kingdom.

Subsequently the owner insured the freight to be earned under the charter party by an insurance "at and from Mauritius to rice ports, and at and thence to a port of discharge in the United Kingdom," "on chartered freight valued at £1,150." The vessel was afterwards lost at Mauritius, by a peril insured against, before she had discharged the whole of her cargo there:

Held, upon the authority of Thompson *v.* Taylor (6 T. R., 478), and Barber *v.* Fleming (Law Rep., 5 Q. B., 59) that the risk on the policy attached upon the arrival of the vessel at Mauritius, and that the assured was therefore entitled to recover.

Jackson *v.* The Union Marine Ins. Co. (limited), 8 L. R. C. P., 472. By the charter party vessel was to proceed with all convenient speed from Liverpool to Newport, and there load a cargo of iron rails for San Francisco.

Insurance on chartered freight, valued at £2,900, at and from Liverpool to Newport in tow, whilst there, and thence to San Francisco, etc.

Ship left Liverpool on January 2, 1872, and on the 4th, before arriving at Newport, took the rocks in Carnarvon Bay, was much damaged, and returned to Liverpool on the 12th April, and was sold, under circumstances held not justifiable.

Jury found that the time required to repair was so long that the charterers were justified in throwing up the charter.

Held, that the insurance company was liable for the loss of the freight.

It has been held that freight could not be insured for a part of the voyage, but there is no reason whatever for this, and it is now quite well settled, both by law and by practise, that freight may be insured for any part of the voyage.

1 Parsons on Marine Insurance, p. 172, citing Taylor *v.* Wilson and other cases.
Violet *v.* Allnutt, 3 Lamb, 419 ; Leatherly *v.* Hunter, 7 Bing., 529 ; Barclay *v.* Stirling, 5 Maule and Sel., 6.

Fifth Point.

The defense that the libellants had not retained half as much risk as the respondents took is disposed of by the finding of fact, that the respondents had expressly consented to this by letter of Feb. 24, 1863. (See 2d finding, page 190.)

Sixth Point.

There is no Statute of Limitations applicable to a Court of Admiralty.

The Court will therefore look at all the circumstances of the case, and see whether there is any ground for saying that the demand is so stale as to be considered neglected and abandoned.

The delay in bringing this suit was for an entirely good reason, and one in which the respondents concurred. It was for the purpose of determining in the suit against the libellants the question of the liability of the libellants. The suit against the libellants was defended at the request, and with the aid and participation of the respondents.

And it was most proper that while that suit was pending the respondents should not be called upon to pay. And it was understood that the liability of the respondents to pay would be determined by the suit against libellants, and if the latter should be compelled to pay, that then, and not till then, the respondents should pay.

The respondents having, on notice from the libellants, undertaken the defense of the suit against the libellants, and paid their money toward it, had a right to expect to remain unmolested until that defense was passed upon.

The Court therefore in the exercise of a sound discretion, will hold that the delay caused by that suit is not to be attributed to neglect, or any purpose to abandon the claim, and that therefore this suit is brought in time.

See on this point Benedict's Adm. §575.
2 Pars. Shipping and Adm., 361 to 363, and notes.
Willard *v.* Dorr, 3 Mason, 91, 161, as to State Statutes and Limiting Suits.
Brown *v.* Jones, 2 Gallis., 477, as to State Statutes.
The Key City, 14 Wall., 653 (and see 2 Ware, 165 180).
The Prospect, 3 Blatchf. C. C., 526.

It may be added that the payment by the respondent of the $100 to Rand was a payment on account of the claim herein, and was made within six years before the filing of this libel.

And moreover, we contend that this action being brought to recover the amount of a judgment against an indemnitee in an action defended by him at the request and for the benefit of the indemnitor, the Statute of Limitations would not begin to run until the payment of the judgment.

Last Point.

Since the original transaction occurred much time has elapsed. Exactly what information was, or was not, in the minds of the parties at the time may not now be susceptible of proof by witnesses then living, and who had actual knowledge upon the subject. But looking at what has been the conduct of the parties since, it can clearly be seen what questions were *not* considered as open questions between them.

And we submit that every one of the questions now raised was, through a course of years, and with full knowledge of the facts, treated by the respondents as not existing.

Now, can the Court possibly be expected to take a more favorable view of the rights and obligations of the respondents than they themselves took?

For instance, the respondents paid a loss on the Rotterdam charter under a reinsurance made under precisely the same circumstances of knowledge as the one now sued upon.

Can the Court be expected to take any view of those circumstances more favorable to the respondents than they themselves then took?

Again, did not the respondents assume continually, down to a very late date, that if the libellants were held to have insured the Rotterdam charter, the the respondents were reinsurers of the same? And this, too, after they had the fullest knowledge of the evidence by which the libellants were shown to have insured that charter? And will the Court give them a better position than they assumed for themselves?

And, once more, did not the respondents by their action evince their readiness to reinsure freight to be earned beyond San Francisco on the passage to San Francisco, although knowing that in case of loss it must be total, and that full freight was to be earned and full cargo carried under another charter between New York and San Francisco?

And is the Court now to be asked to say that they could have had no such readiness?

And have they not shown that the fact, that such freight to be earned beyond San Francisco was freight under the Rotterdam charter, was no surprise to them, and no objection to the payment of insurance on it, by actually paying such insurance? And is the Court to be asked to say that it was nevertheless an objection?

May we not justly say, then, that the reality of this contract of reinsurance, as we contend it was in fact made, is clearly indicated by each one of the foregoing considerations and by the good faith and consistency which should control parties in a business transaction, and that all of them together create a force of testimony which is irresistible.

The conclusions of law being fully sustained by the findings of fact, the judgment appealed from should be affirmed with costs.

BENEDICT, TAFT & BENEDICT,

Proctors for Libellant and Appellee.

17-485

SUPREME COURT U. S.
FILED
DEC 8 1882
JAMES H. McKENNEY, CLERK

Supreme Court of the United States.

THE SUN INSURANCE COMPANY, APPELLANT,

vs.

THE OCEAN INSURANCE COMPANY, LIBELLANT AND APPELLEE.

No. 119.

Brief in Reply for Appellee.

An examination of the brief submitted on behalf of the appellants herein leads us to present the following considerations in reply:

First. We could not have anticipated that the very eminent counsel, who now appears in the case for the first time, would attempt to argue this case otherwise than within the limits prescribed by statute and the decisions of this court.

Second. It must be conceded that the findings and the exceptions thereto, and to any refusals to find facts requested to be found, which are sustained by satisfactory and uncontradicted evidence, if any there were, constitute the only proper basis of discussion before this court. (The Francis Wright.)

Third. Had those limits been observed in the brief of the counsel, the course of the discussion would not have differed from that in the circuit court, as presented in the brief of Mr. Choate, which is printed here, as it was there used, with

the omission of the point in relation to the Ocean Company not retaining half of the risk, a question removed from the case by the new evidence taken at circuit and the finding thereon. (Finding 2.)

Fourth. The departure from the above limit, to which we refer, appears notably under the third point of the new brief, (pages 22 to 25,) where facts not found, nor requested to be found, are assumed and sought to be made available in this discussion; and an argument is made *as upon a finding of positive fraud* (Brief, p. 23, subd. 5) *on the part of the Ocean Company, and of circumstances to sustain such a finding.*

Those circumstances, so treated as though found, involve a knowledge of over-insurance and a plan of fraud. They involve the relative rates of premiums received and paid by the Ocean Company; the time when the Ocean Company obtained the re-insurances, with reference to the time of its original insurances; its purposes in obtaining such re-insurances; other insurance by Melcher assumed to have been known to the Ocean Company; a reference to a letter at the foot of page 14 of the brief; and other details, all of which will doubtless strike the Chief Justice who heard the case at circuit, and Mr. Justice Blatchford, who heard it in the district court, as entirely new matter, never before referred to.

Fifth. But clearly none of these new matters can by any possibility be referred to here. They have never been before alleged, litigated, considered, passed upon, or even requested to be found.

In all the questions put to the experts they are nowhere referred to. Nothing whatever was ever before suggested in the way of concealment but what related to the two charters; or, perhaps, to be more exact, what related to the Rotterdam charter, as to which it was claimed that Sawyer com-

municated to the Ocean Company information which it did not disclose to the Sun Company.

Sixth. There is no finding of any material concealment. On the contrary, the finding is against it.

And the only requests by counsel of the Sun Company to find as matters of fact on this point were these:

"11. That at the time of making such insurance the agent of Melcher, by whom it was applied for and effected, gave full and detailed information to the president of the plaintiff of the existence and the terms of the said charter to Rotterdam, and exhibited to the said president Melcher's letter of instruction, (Exhibit E in the apostles,) in which it was fully and particularly described, as was the charter to San Francisco, from which it was plainly distinguished, and the said president expressly agreed with him by the said policy to cover the said Rotterdam charter, and not the San Francisco charter.

"12. That in making the said application to the respondent for the said insurance the libellant did not disclose to the respondent the said letter or the information communicated to him by the said Melcher's agent at the time of his applying for and effecting the insurance with the libellant, or any part thereof, or of the substance thereof, but withheld from the respondent all such information and knowledge.

"13. That the knowledge and information so withheld and not disclosed were material to the risk, if the libellant intended to obtain an insurance upon the said charter to Rotterdam, or upon any other than the charter to San Francisco, which was known to the respondent and properly described by the words of said application." (Record, page 182.)

And the only requests as to conclusions of law thereon were these:

"Ninth. The information in respect to the guano charter, communicated to the libellant's president by Melcher's

agent, on procuring insurance from the libellant, was material to the risk, if libellant intended to obtain insurance from the respondent on that charter.

"Tenth. The failure to disclose to the respondent this information or the substance thereof, upon making its application for insurance, was a material concealment or non-disclosure, making void any insurance which might otherwise have covered such charter." (Record, page 184.)

Seventh. It follows, therefore, conclusively, that the case admits of no discussion as to material concealment outside of the facts pertaining to the two charters, which claim of concealment we have already fully discussed upon our brief. The attempt to import new matter seems to concede that the grounds, on which the claim of concealment has hitherto been made, cannot be sustained.

Indeed, on the state of the findings, how any such or any material concealment is to be found by this court, we are at a loss to imagine.

It may be proper for us to add that, if the object be to cast odium upon the Ocean Company, we in no wise doubt that had all *possible* matters been made the subject of allegation in the answer, and of full and fair investigation, the claim of the Ocean Company upon this re-insurance would still have been entirely clear.

And that this may not appear to be a mere expression of confidence on our part, we may be permitted to call attention to the utter want of reliance to be placed upon the assumption of the learned counsel that the rate of premium on this re-insurance paid by the Ocean Company was greater than it received from Melcher. The counsel takes it for granted that the rate of 6 per cent., named in the re-insurance, expresses the whole matter; but this takes no account of the practice of giving premium notes on time, so that even this payment would be postponed at a considerable saving of interest; nor does he consider the matter of scrip

which the Ocean Company would receive from the Sun *Mutual* Company. So, on the other hand, he assumes that the Ocean Company was to receive from Melcher only 5½ per cent., whereas by the policy, under the very contingency covered by the insurance, viz., that the ship should carry more than her registered tonnage of guano, (Record, p. 93,) the Ocean Company was to receive an additional one per cent.

These suggestions, we think, are sufficient to show the utter unsafety of attempting to get at new facts without pleadings, trial, or findings. We might go on and show that the claim that the Ocean Company knew of over-insurance by Melcher is equally without foundation, [consider the absolute failure to even make out the fact of the over-insurance as a defence in Maine, (see Record, p. 21,)] and that the charge that Woodbury dealt with the Sun Company with knowledge of a plan "anticipated, if not meditated," that the vessel should be lost, is an unjust aspersion upon the memory of a most worthy and estimable man now long since dead. (See the brief, p. 23, subd. 3 and 5.)

But considering that all these matters are entirely irrelevant to the case, we do not think we should be justified in asking the further attention of this court to them.

Eighth. The court should note that all the evidence contained in the record in the suit in Maine was put in evidence by the Sun Company, and admitted simply as showing what the evidence was in that suit, and not as evidence in this case of the facts themselves embraced in such evidence. (See page 36.)

This evidence includes from page 88 to page 147, and from page 147 to page 149, of the printed record.

Yet we observe that the counsel in several instances refers to parts of this evidence as though they were proof in this action of the matters embraced in them.

If this evidence were to be so treated, it would follow that the liability of the Ocean Company to Melcher would be proved in this action thereby, without reference to the judgment.

Ninth. Another matter in the brief referred to seems to us to demand a remark.

We refer to the way the counsel, upon page 9 of his brief, states the making of the defence by the Ocean Company that its policy did not cover the Rotterdam charter, as though that were a simple matter of fact, without any peculiar history to it. We submit that after the full history of that defence, as proven in findings 23 to 31, and referred to at much length in the opinion of the circuit court, (p. 187, fol. 359,) this apparently *artless* way of putting it is somewhat remarkable.

Tenth. We could refer to other instances in which the counsel appears not to have been true to the basis of this discussion; but it is unnecessary, as this court will not fail, we are sure, to apply to this case the rule, so deliberately laid down in repeated cases, that the questions to be considered by this court are to be confined to the questions of law arising on the findings of the circuit court.

The Abbotsford, 98 U. S., 440.
The Benefactor, 102 U. S., 214.
The Adriatic, 103 U. S., 730.
The Annie Lindsley, 104 U. S., 185.
The Francis Wright, not reported.

And we are confident that, on a consideration of those findings, the court will determine that the conclusions of law are fully supported by the facts found.

Eleventh. In answer to the fourth point of the appellant's brief we remark:

1. The defence that the Ocean Company had no insurable interest in the Rotterdam charter has never been set up. What was set up was that it had no insurable interest in the San Francisco charter. (See Mr. Choate's brief, p. 4.)

2. It is a mistake to say that the supreme court in Maine put the possibility of this insurance upon its being entered into "with complete knowledge and with express attention to the precise quality and extraordinary traits of the risk."

What that court held was that "the facts that there was a charter-party between the plaintiff and others for a voyage from New York to San Francisco and an insurance thereon by another company *constitute no defence*, unless the liability of the defendants was thereby increased or injuriously affected." And the court goes on to say that the risk was not affected and there was no allegation that the risk was affected by the fact of the vessel's earning freight.

There is no such allegation here.

3. Reference to the opinion of Chief Justice Appleton (Record, p. 161,) will show that in the view there expressed there is not a particle of difference in effect between the circumstances of the contract between Melcher and the Ocean Company and those of the contract between the Ocean Company and the Sun Company.

Indeed, that is the effect of the findings, whereby the conclusion is reached that the re-insurance covers the Rotterdam charter, and that there was no material concealment.

Twelfth. The only other suggestion in the brief which seems to us to call for remark is the suggestion in the sixth point of the appellant's brief that the decree is too large, because the policy was an open and not a valued policy. It is sufficient to say that the question of value was litigated in the suit in Maine, and that, if the respondents are bound by that judgment, they are bound by this part of it also.

But we add that the calculation of value on page 4 of the